American Law of Charities

CARL ZOLLMANN

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American Law of Charities

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TO THE MEMORY OF MY PARENTS

Rev. C. ZOLLMANN
1844-1922

KATHERINE ZOLLMANN
1850-1923

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PREFACE

The successful foundation, development, and support in America of educational, eleemosynary, and religious institutions upon a purely voluntary basis is one of the outstanding achievements of our democracy. Into this great system, symbolized on every hand by school, hospital and church edifices, has gone a large part of the moral energy which three generations of men and women have been able to spare from the necessary task of earning a living. Into it have entered, and are constantly entering, many of the vast fortunes accumulated in this land of limitless opportunity. In it are expended today the finest efforts of the best citizens of the land. A legal treatise on this subject would, therefore, seem to be appropriate.

In considering the American law, not too much reliance should be placed on its British counterpart. The latter has been very much influenced by the prerogative powers vested in the king or queen and by the English church establishment. It has, therefore, been defined as "the exceptional corrective of a system that sought to regulate conscience by law, and that denounced ecclesiastical endowments." In addition this system has, during the reign of Victoria, undergone extensive changes at the hands of Parliament, being placed very largely in the hands of the English Charity Commission. While, therefore, the English coincides with the American law at numerous points, it is now quite distinct from it, and is not only adapted to, but actually demands separate treatment. Accordingly, extensive English monographs have been published by Duke, Boyle, Tyssen and Tudor, the last mentioned work reaching its fourth edition in 1906, while the second edition of Tyssen came out in 1922. On the other hand, the American law has received but incidental consideration in general works on wills, trusts, property, and equity jurisprudence. An American work would, therefore, seem to be in order.

The present book is a companion volume of the author's

first literary effort published in 1917 by Columbia University under the title "American Civil Church Law." When the author, in 1915, began work on this volume, he intended at first to cover charitable trusts so far as they affect the various denominations. This plan soon proved to be impracticable. The law in regard to religious charities is so intimately interwoven with that concerning eleemosynary, educational, and municipal charities, that an adequate separate treatment was found to be an utter impossibility. The present volume has been written as a result of this situation.

The method pursued in producing the book has varied but slightly from that employed in writing the work on Church law. In both literary ventures a list of the decided cases was procured from the digests in advance of their intensive study. In both, the cases were read in their chronological order, in the former disregarding state lines, in the present by reading the decisions by states. The work itself has been largely done in the splendid library of the Chicago Law Institute, and has been personally performed by the author in its entirety. Though there was no intention to publish any of the chapters separately, the author has, at the request of the Columbia, Marquette and Michigan Law Reviews, consented to the publication of the second, fifth and nineteenth chapters respectively in these journals.

It is quite impossible to understand the subject of the book without a proper historical retrospect. The first chapter, therefore, deals with the English situation which led up to the enactment of the Statute of Elizabeth, as it has been brought to light largely through the efforts of courts and counsel on this side of the Atlantic. The second chapter treats of the historical development of the charity doctrine in the various states, and has been gathered together from cases, statutes, constitutions and general works on American history. The third chapter is concerned with the **cy pres** doctrine and its history. With this development in mind, the reader will not experience any great difficulty in understanding, applying and distinguishing the decisions of the various states. In using the earlier cases, however, the obscurity in which the subject was then enveloped should not be overlooked.

The other chapters easily take their proper places. Chap-

ters IV to VIII deal with the definition of the term "charity," and apply such definition to the four distinct classes of charitable trusts. Chapters IX to XI treat of the definiteness necessary in such trusts and the discretion that may be vested in their trustees. Chapters XII and XIII show the influence exerted over charitable trusts by mortmain and perpetuity statutes. Chapters XIV to XVI are concerned with the supervision over and the construction and termination of charitable trusts. Chapter XVII takes up the questions of conflict of law that have arisen in connection with charities. The remaining two chapters deal with the exemption of charitable institutions from taxation and damage liability—matters of obvious importance to these institutions.

The purpose of the author has been to provide a guide, not only for the various charitable institutions scattered throughout the country, but also for their benefactors and trustees and for the attorneys of both. With this view the index has been made quite complete both on the law and the facts; an appendix containing practical suggestions for and forms of charitable gifts, devises and bequests has been added, and the citation of the American authorities has been brought down to the cases available on January 1, 1924.

In closing, it affords the author great pleasure to acknowledge the encouragement received by him from his colleagues on the Marquette faculty of law, particularly Dean Max Schoetz, Jr., to whose efforts the publication at this time is due.

CARL ZOLLMANN.

Milwaukee, Wisconsin,
June 1, 1924.

TABLE OF CONTENTS

		Page
Chapter	I—Statute of Elizabeth	1-19
Chapter	II—American Development	20-70
Chapter	III—Cy Pres Doctrine	71-119
Chapter	IV—What is a Charity?	120-160
Chapter	V—Religion	161-181
Chapter	VI—Benevolence	182-197
Chapter	VII—Education	198-211
Chapter	VIII—Municipal Purposes	212-219
Chapter	IX—Definiteness	220-256
Chapter	X—Discretion	257-308
Chapter	XI—Trustees	309-340
Chapter	XII—Mortmain Statutes	341-360
Chapter	XIII—Rule Against Perpetuities	361-386
Chapter	XIV—Construction	387-417
Chapter	XV—Supervision	418-434
Chapter	XVI—Termination	435-446
Chapter	XVII—Conflict of Laws	447-456
Chapter	XVIII—Tax Exemption	457-535
Chapter	XIX—Damage Liability	536-559
Appendix	—Suggestions for and Practical Forms of Charitable Devises and Bequests	561-570

ANALYSIS OF CHAPTERS

CHAPTER I

Statute of Elizabeth.....Pages 1-19

§ 1. Heathenism Devoid of Charity
§ 2. Jewish Law of Charity
§ 3. Jewish Law of Charity. Consequences
§ 4. Charity a Product of Christianity
§ 5. English Charity Law. Connection with Roman Law
§ 6. Importance of Statute of Elizabeth in England and America
§ 7. Early Supreme Court Decision and Its Consequences
§ 8. Investigations Following Such Decision
§ 9. Girard Will Case. Reversal of Early Decision
§ 10. Early Controversies Summarized
§ 11. Difficulties in Adapting the English Law to America
§ 12. Essentials of English Doctrine in Force in America
§ 13. Difficulties of Determining Whether English Law Rests on Statute of Elizabeth
§ 14. Aids Available Summarized
§ 15. Purpose of Statute. English Construction
§ 16. English Dicta
§ 17. Testimony of Francis Moore, the Draftsman of the Statute
§ 18. Historical Facts Supporting Such Testimony
§ 19. Statutes Passed Before 1530
§ 20. Statute of Superstitious Uses
§ 21. Other Historical Evidence. Mortmain Statutes
§ 22. The Custom of the Ordinary
§ 23. Chancery Cases Antedating the Statute
§ 24. Preamble of Statute
§ 25. Conclusiveness of the Statute
§ 26. Summary

CHAPTER II

American Development.....Pages 20-70

§ 32. Grouping of States. General Principles
§ 33. Minority Group. General Situation
§ 34. First Class of Minority Group Generally
§ 35. Virginia. Early History
§ 36. Virginia. Later Development
§ 37. Virginia. Modification as to Church Charities
§ 38. Virginia. Modification as to other Charities
§ 39. Attempt of Virginia Court to Break its Fetters
§ 40. West Virginia. Adoption of Virginia Rule
§ 41. West Virginia. Statutory Modification
§ 42. Maryland. General Situation
§ 43. Maryland Statutory Relief
§ 44. Maryland. Gift inter Vivos
§ 45. District of Columbia
§ 46. Second Group of Minority States. Reasons for Aberration
§ 47. New York. Repeal of English Statutes
§ 48. New York Trust Statute. Early Construction

§ 49. Attacks on Such Early Construction of New York Statute
§ 50. Early Repulse of Such Attacks
§ 51. Yielding of the New York Court to Such Attack
§ 52. History of Such Yielding
§ 53. Result of this Yielding by the New York Court
§ 54. Effect of Tilden Will on New York Law
§ 55. Tilden Act and Its Amendments
§ 56. Construction of Tilden Act
§ 57. Tilden Appreciation
§ 58. Michigan. Repeal of English Statutes
§ 59. Michigan. Copy of New York Act. Construction
§ 60. Michigan. Personal Property Situation
§ 61. Michigan. Return to English Charity Doctrine
§ 62. Wisconsin. Adoption of New York Trust Statute
§ 63. Wisconsin. Adoption of New York Construction of Trust Statute
§ 64. Wisconsin. Exception Made by Doctrine of Equitable Conversion
§ 65. Wisconsin. Question of Definiteness of Beneficiaries
§ 66. Return of Wisconsin to English Charity Rule
§ 66a. Cross Currents in Wisconsin
§ 67. Minnesota. Adoption of New York Statute. Effect
§ 68. Minnesota. Personal Property
§ 69. Third Group of Minority States
§ 70. Mississippi Constitution
§ 71. Construction of Mississippi Constitution
§ 72. Probable Reason for Mississippi Constitutional Provision
§ 73. Four Classes in Majority Group
§ 74. First Class of Majority Group
§ 75. Connecticut
§ 76. Rhode Island. Early Statute
§ 77. Rhode Island. Subsequent Amendment
§ 78. North Carolina
§ 79. Kentucky. Early History
§ 80. Kentucky. Later Development
§ 81. Kentucky Statute. Construction
§ 82. Georgia
§ 83. Louisiana. Civil Law Situation
§ 84. Louisiana. Ratification by Public Authorities
§ 85. Statutory Approach in Lousiana to English Doctrine
§ 86. Pennsylvania. Early History
§ 87. Pennsylvania. Early Statute
§ 88. Pennsylvania Statute of 1855
§ 89. Amendment of Pennsylvania Statute of 1855
§ 90. Pennsylvania. Results of Statutory Policy
§ 91. Second Class of Majority Group
§ 92. Massachusetts
§ 93. Indiana
§ 94. Missouri, Illinois, Arkansas, Colorado, Wyoming and Florida
§ 95. Third Class of Majority Group. Alabama, Vermont, Arizona, California, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington
§ 96. Judicial Construction of Such Statutes
§ 97. Fourth Class of Majority Group
§ 98. Delaware, New Hampshire, New Jersey and South Carolina
§ 99. Statutes of Parent States

§ 100. Tennessee
§ 101. Maine
§ 102. Texas, Iowa, Ohio, Oregon. Generally
§ 103. Oregon, Texas, Ohio
§ 104. Iowa
§ 105. Federal Courts
§ 106. Divergence in the Authorities
§ 107. Summary

CHAPTER III

Cy Pres Doctrine.....Pages 71-119

§ 117. Roman Law
§ 118. Middle Ages. Situation
§ 119. Reasonable Basis of English Cy Pres Doctrine
§ 120. English Cy Pres Doctrine not Judicial
§ 121. Examples of English Cy Pres Application
§ 122. English Doctrine not in Force in America
§ 123. Judicial Doctrine Retained in America
§ 124. Liberal Construction
§ 125. Valid Gift as a Prerequisite
§ 126. States in Which the Doctrine is not in Force
§ 127. States Which Have Wavered in Applying the Doctrine
§ 128. Reason for Doctrine
§ 129. What is a Valid Approximation?
§ 130. Illustrations of Refusal to Apply the Doctrine
§ 131. Illustration of the Application of the Doctrine
§ 132. General and Special Intent
§ 133. Difficulty in Distinguishing General and Special Intent
§ 134. Special Intent Becoming Impossible
§ 135. General Intent Carried Out Over Special Intent
§ 136. General Intent Incapable of Accomplishment. Fraud
§ 137. Conflict Between the Two Intents
§ 138. Illustrations of Special Intent
§ 139. Donor's General Intent Not to be Subverted
§ 140. Donor's Intent the Pole Star
§ 141. Difficulties in Distinguishing Between the Two Intents
§ 142. Cases in Which no General Intent will be Deduced
§ 143. A General Intent Must be Indicated
§ 144. Religious Charities
§ 145. Gift to Defunct Corporation
§ 146. Gift to Corporation. Absence of General Intent
§ 147. Gift to Corporation. Presence of General Intent
§ 148. Reverter Clause. Importance
§ 149. Reverter Without Reverter Clause
§ 150. Alternative Provision
§ 151. Illegality of One of Testator's Purposes
§ 152. Illegality of a Part of Testator's Scheme
§ 153. Subsidiary Condition Illegal
§ 154. Legal and Illegal Means
§ 155. Impossibility of Executing a Part of Donor's Plan
§ 156. Actual Necessity Must be Shown
§ 157. Unexpected Diminution. Minority View
§ 158. Unexpected Diminution. Majority Rule
§ 159. Education
§ 160. Scholarship. Tuition
§ 161. Sale of Real Property
§ 162. Express Power to Sell
§ 163. Implied Power to Sell
§ 164. Implied Power to Sell. General Intention
§ 165. Illustrations

§ 166. Condition Against Sale. Implied Power
§ 167. Illustrations
§ 168. Sale. Charity Must be Benefited
§ 169. New Trustee. Appointment. Special and General Intent
§ 170. Court Decree. Importance
§ 171. Legislative Power
§ 172. Miscellaneous Applications
§ 173. Summary. Judicial Power
§ 174. Summary. Prerogative Power

CHAPTER IV

What Is A Charity?.....Pages 120-160

§ 184. Necessity and Propriety of Charitable Gifts
§ 185. Definition. Difficulty
§ 186. Limitation of Charity
§ 187. Charity a Technical Word
§ 188. Definition. Generally
§ 189. Grant's Definition. Statute of Elizabeth
§ 190. Extent of Grant's Definition
§ 191. Enlargement by Analogy
§ 192. Enlargement by Analogy Continued
§ 193. Enlargement by Analogy Concluded
§ 194. Defect of Grant's Definition
§ 195. Horace Binney's Definition
§ 196. Binney's Definition. Criticism
§ 197. Binney's Definition. Criticism Continued
§ 198. Binney's Definition. Conclusion
§ 199. Illustrations of Valid Charities Commemorating the Donor's Name
§ 200. Camden's Definition
§ 201. Gray's Definition
§ 202. Definition of Swayne, Pomeroy and Perry
§ 203. Louisiana, Rhode Island, Missouri and California Definitions
§ 204. Private Charities
§ 205. Private and Public Charities
§ 206. Mutual Benefit Societies
§ 207. Lodges
§ 208. Lodges Continued
§ 209. Abuse of Charitable Funds
§ 210. Public Policy
§ 211. Wisdom
§ 212. Inadequacy
§ 213. Conveyance by One Charity to Another
§ 214. Execution
§ 215. Acceptance by Trustee
§ 216. Acceptance by Beneficiary
§ 217. Wills, Deeds, Dedication and Subscription
§ 218. Other Means of Creating Charities
§ 219. Pay by Beneficiaries
§ 220. Pay by Beneficiaries. Illustrations
§ 221. Classes of Charities. Consequences
§ 222. Validity of Gifts to Destroy Religion
§ 223. Public Defined
§ 224. Religion and Charity not Antagonistic
§ 225. Summary

CHAPTER V

Religion ..... **Pages 161-181**

§ 235. Religious Charities. Difficulties
§ 236. Statute of Elizabeth
§ 237. Reason for Recognizing Religious Charities
§ 238. Other Reasons for such Recognition
§ 239. Religious Purpose. Description
§ 240. Denominational Moulds
§ 241. Denominational Moulds Continued
§ 242. Denominational Moulds. Evidence
§ 243. Extension of Statute of Elizabeth
§ 244. Parochial and Sunday Schools
§ 245. Education for the Ministry
§ 246. Missions
§ 247. Mission Instruments
§ 248. Mission Schools and Houses, Bible and Tract Societies
§ 249. Home Missions
§ 250. Superstitious Uses
§ 251. Superstitious Uses Inconsistent with Our Constitution
§ 252. Superstitious Uses. Conclusion
§ 253. Masses.
§ 254. Masses. Definition
§ 255. Masses. Conclusion
§ 256. Masses. Exceptional States
§ 257. Masses. Extraordinary Decisions
§ 258. Summary

CHAPTER VI

Benevolence ..... **Pages 182-197**

§ 259. Church Poor Relief. History
§ 260. Objectionable Features
§ 261. American Situation
§ 262. Purpose of Chapter
§ 263. Churches as Relief Agencies
§ 264. No Religious Character
§ 265. Homes. Classes of Beneficiaries
§ 266. Examples of Homes
§ 267. Hospitals. May be Commercial Ventures
§ 268. Charitable Hospitals
§ 269. Enumeration of the Statute of Elizabeth
§ 270. Cases Within the Letter of the Statute
§ 271. Analogous Cases
§ 272. Temperance
§ 273. Cruelty to Animals
§ 274. Reformatories
§ 275. Voluntary Fire Companies
§ 276. Fire Patrols. Insurance Companies
§ 277. Loans. Franklin Will
§ 278. Loan Associations
§ 279. Summary

CHAPTER VII

Education ..... **Pages 198-211**

§ 290. Schools. Generally
§ 291. Education a True Charity
§ 292. Importance and Early Recognition
§ 293. Broad Aim

in **Philadelphia Baptist Ass'n v. Hart**[6] had decided that the law of charitable trusts was based on the statute of Elizabeth, and had fallen to the ground with the repeal of that statute. In view of the fact that this case arose in Virginia, and that the opinion handed down embodied the best information on the subject then available and was written by Chief Justice Marshall, it is not surprising that the Virginia court in 1832 followed it,[7] taking the position that charitable trusts stand on the same footing as other trusts, and will alike be sustained or rejected. Therefore, in the very language of the Virginia court, the Virginia charity doctrine "did not have its judicial birth in Virginia, but was an error copied from the Supreme Court of the United States."[8]

§ 37. **Virginia. Modification as to Church Charities.** This doctrine did not remain law in its entirety for any great length of time. By a curious Virginia theory of public policy, church corporations are proscribed in the Old Dominion state.[9] It is obvious that under this policy a congregation could not hold property as a corporation, and that under the decision of the court it could not hold it by trustees. No means were, therefore, available by which it could be secure in the possession of the plot of ground on which it had erected its house of worship. This condition was intolerable. Accordingly, the legislature was appealed to, and in 1839 and 1842[10] passed acts which validated conveyances to trustees for local church purposes,[11] whether such conveyances were made by deed or devise before, or by deed[12] after the enactment of the statute. These statutes were reënacted in 1849 and were extended to dedications of real property on the one hand, and to gifts of personal property on the other.[13]

§ 38. **Virginia. Modification as to other Charities.** The

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[6] 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499 (1819).

[7] 1832, Gallego's Executor v. Attorney General, 30 Va. (3 Leigh) 450, 462, 24 Am. Dec. 650.

[8] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 766.

[9] This policy was incorporated some time later into the constitution of the state. Art. 5, Section 17.

[10] 1889, Trustees v. Guthrie, 86 Va. 125, 150, 10 S. E. 318, 6 L. R. A. 321; 1899, Handley v. Palmer, 91 Fed. 948, 954 (affirmed 103 Fed. 39, 43 C. C. A. 100).

[11] 1856, Brooke v. Shacklett, 54 Va. (13 Grat.) 301.

[12] 1859, Seaburn v. Seaburn, 56 Va. (15 Grat.) 423.

[13] Chapter 77, Sections 8, 9, 10, 11, 12, 13. 1877, Kain v. Gibbony, 101 U. S. 362, 25 L. Ed. 813 (affirming Fed. Cas. No. 7595, 3 Hughes 397).

legislature did not stop with protecting transfers to religious bodies. While eleemosynary demands were quite well attended to at the time under a law passed in 1802, under which the property of the former church establishment in the state had been gradually passing to the commissioners of the poor in the various counties on the death or removal of the clergymen in charge in 1802, educational charities were not so well protected and needed a fostering care. Education was recognized as an object so desirable that obstacles to private munificence in its favor should be eliminated. Accordingly, the legislature in 1839 validated testamentary gifts for such purposes, but retained the right to declare them void. This statute was amended in 1860 by declaring valid all such gifts made since 1839 and not since invalidated by legislative action.[14] The feeling toward such gifts was so friendly that a further statute was passed in 1874 "to give effect to a compromise of the litigation in respect to the construction and effect of the will of Samuel Miller, deceased, and to establish the manual labor school provided for in the twenty-fifth clause of said will."[15] Just what classes of "indefinite charities"[16] are now validated in the state thus depends upon the statutes. It is to be hoped that eventually, through legislative action, the system of charitable trusts thus partly reinstated will receive full recognition.

§ 39. **Attempt of Virginia Court to break its Fetters.** The Virginia court has not always adhered to its own charity doctrine, followed though it had been in numerous cases,[17] and recognized as it was by the legislature through the enactment into law of exceptions to it. After the leading case on the subject already referred to had not only stood unchallenged for more than fifty years, but had repeatedly been

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[14] Code of 1860, Chapter 80, Section 2. 1870, Kelly v. Love, 61 Va. (20 Grat.) 124, 131, 132.

[15] 1874, Kinnaird v. Miller, 66 Va. (25 Grat.) 107, 111. See 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 759, 760. Other legislative acts have followed. 1917, Pirkey v. Grubb, 122 Va. 91, 94 S. E. 344. See Virginia Statutes of 1887, Chapter 65, in favor of educational charities.

[16] 1874, Roy v. Rowzie, 66 Va. (25 Grat.) 599, 607-610.

[17] 1856, Brooke v. Shacklett, 54 Va. (13 Grat.) 301, 309; 1859, Seaburn v. Seaburn, 56 Va. (15 Grat.) 423, 425; 1872, Commonwealth v. Levy, 64 Va. (23 Grat.) 21, 40; 1884, Petersburg v. Petersburg Benevolent Mechanics Ass'n, 78 Va. 431, 436.

§ 427. Miscellaneous Classifications
§ 428. May Testator's Relatives be Made Beneficiaries?
§ 429. Education of Testator's Relative for the Ministry
§ 430. Classification Based on Relationship. Negative View
§ 431. Classification Based on Relationship. Majority View
§ 432. Distinction Between Gift to Charity and Gift to Trustee for a Charity
§ 433. Wide Discretion Vested in Trustee
§ 434. Illustrations of Wide Discretion
§ 435. Discretion Need Not Be Unlimited
§ 436. Louisiana Rule
§ 437. Summary. Discretion Limited to Charities
§ 438. Summary. Court Action
§ 439. Summary. Latitude of Discretion
§ 440. Summary. Basis of Classification

CHAPTER XI

Trustees .....Pages 309-340

§ 451. Importance
§ 452. Personal Trustee. Objection
§ 453. Appointment by Court. Generally
§ 454. Incapacity of Trustee
§ 455. Refusal
§ 456. Failure to Act
§ 457. Permanent Charity. Implied Power to Appoint
§ 458. Non-existence
§ 459. No Trustee Appointed.
§ 460. Gift to Class Direct
§ 461. Trust Sufficiently Definite
§ 462. Technical Words Not Necessary to Appointment
§ 463. Successors. Appointment
§ 464. Appointment by Reference to Office, Position, etc.
§ 465. Duties, Powers, Liabilities
§ 466. Bonds
§ 467. Who May Be Trustee. Judges and Attorney General
§ 468. Incorporation of Trustee
§ 469. Charitable Corporation as Quasi Trustee
§ 470. Charitable Corporation as Trustee
§ 471. Municipality as Trustee
§ 472. Charitable Corporation. Private Nature
§ 473. Absolute Gift to Charitable Corporation. Construction
§ 474. What Is a Charitable Corporation?
§ 475. Gift Subject to Annuity
§ 476. Dissolution of Charitable Corporation. Distribution of Assets
§ 477. Municipal Corporation as Trustee
§ 478. Limitations on Municipal Corporation
§ 479. Gift to City Need Not Be to Municipal Purpose
§ 480. Change in Municipal Corporation. Effect
§ 481. Division of Municipal Corporation. Effect
§ 482. Growth of Municipal Corporation. Effect
§ 483. State or United States as Trustee
§ 484. Summary. Personal Trustee
§ 485. Summary. Corporate Trustees

CHAPTER XII

Mortmain Statutes .....Pages 341-360

§ 493. Mortmain and Perpetuity Statutes Distinguished
§ 494. English Mortmain Statutes. History

§ 495. English Statutes Inapplicable in America
§ 496. Classes of Mortmain Statutes
§ 497. Capacity of Donee Limited
§ 498. Foundation Purely Statutory
§ 499. States without Mortmain Policy
§ 500. New York Statute of Wills
§ 501. Who Can Raise the Question
§ 502. Gift Held Void. Consequences
§ 503. Gift Held to be Only Voidable. Consequences
§ 504. Donor's Power Limited
§ 505. Two Classes of Statutes Limiting Donor's Power
§ 506. Time Limit Statute. Reason and History
§ 507. Time Limit Statute. Reason.
§ 508. Exception of State or Municipality
§ 509. Codicil within Prohibited Period
§ 510. Evasion of Statute. Secret Trust
§ 511. Absolute Gift without Secret Trust
§ 512. Inherent Difficulties in Evasion
§ 513. Statute Limiting Amount that May Be Given to Charity
§ 514. Statutes Limiting Amount. Construction
§ 515. Donor Must Be Just Before He Is Generous
§ 516. Summary

CHAPTER XIII

Rule Against Perpetuities.....Pages 361-386

§ 527. Reason. Twofold Meaning
§ 528. Rule of Perpetuity. A Test of Charity
§ 529. Inalienable Interest
§ 530. Inalienable Interest May Be Vested in a Charity
§ 531. Power to Corporations. Repeal of Statute Pro Tanto
§ 532. One Charity Limited on Another
§ 533. Trust Must Be a Charitable One
§ 534. Charitable Character Decisive
§ 535. Burial of Testator and Upkeep of Grave
§ 536. Monument to Testator's Memory
§ 537. Fund for Upkeep of Grave
§ 538. Legislative Intervention
§ 539. Condition for Upkeep of Donor's Grave
§ 540. Gift to Cemetery
§ 541. That a Charity Creates a Perpetuity is Immaterial
§ 542. Charitable Trusts Create Permitted Perpetuities
§ 543. Possession Postponed
§ 544. Dispensation of Charity Postponed
§ 545. Liberal Construction
§ 546. Charitable Gifts Must Vest Within Statutory Time
§ 547. Charitable Gifts Must Vest Within Statutory Time
§ 548. Liberal Construction
§ 549. Charity Limited on Void Private Trust
§ 550. States Which Abolish the English Charity Doctrine
§ 551. Accumulations. Validity
§ 552. Accumulations. Invalidity
§ 553. Accumulation and Principal Gift Separable
§ 554. Request for Accumulation. Invalid in Part
§ 555. Summary. Perpetuities
§ 556. Summary. Accumulations

CHAPTER XIV

Construction .....Pages 388-417

§ 567. Private and Charitable Trusts. Distinction
§ 568. Reason for Distinction

§ 569. Expressions of Courts
§ 570. Expressions of Courts. Continued
§ 571. Consequences of this Attitude
§ 572. Limits of Liberal Construction. Generally
§ 573. Donor's Intent Will Be Regarded
§ 574. Meaning Must Be Gathered From Words
§ 575. Vague Wish by Testator
§ 576. Mortmain and Perpetuity Statutes
§ 577. Ambiguous Language
§ 578. No Technical Language Necessary
§ 579. Examples of Liberal Construction. Validity
§ 580. Other Examples of Liberal Construction
§ 581. Ambiguity. Generally
§ 582. Ambiguity. Examples
§ 583. Patent and Latent Ambiguities
§ 584. Mistake of Law or Fact
§ 585. Latent Ambiguity Favored
§ 586. Description of Beneficiary
§ 587. Gifts in Ease
§ 588. Slight Misdescription of Beneficiary
§ 589. Abbreviated or Popular Name
§ 590. Geographical Mistake
§ 591. Legislative Favor
§ 592. Summary

CHAPTER XV

Supervision ..... **Pages 418-434**

§ 603. Visitorial Power. Generally
§ 604. Visitorial Power Vested in Corporations
§ 605. Subscribers to a Fund. Visitorial Power
§ 606. Heirs of Donor as Visitors
§ 607. State as Visitor
§ 608. Courts and Visitorial Power
§ 609. Power of Courts as Visitors
§ 610. Power of Courts as Visitors. Continued
§ 611. Limitation of Courts' Power
§ 612. Court Does Not Act of Its Own Motion
§ 613. Attorney General Proper Complainant
§ 614. Attorney General as Defendant. Intervention
§ 615. Attorney General Not Always a Necessary Party
§ 616. Information. Attorney General as Defendant
§ 617. Other Parties
§ 618. Necessary Parties
§ 619. Settlement of Law Suit
§ 620. Costs in Charity Litigation
§ 621. Supervision by Commission
§ 622. Municipal Regulations
§ 623. Summary

CHAPTER XVI

Termination ..... **Pages 435-446**

§ 634. Temporary Charities
§ 635. Methods of Termination
§ 636. Conditions. Generally
§ 637. Reverter Clause. Single Donor
§ 638. Subscription
§ 639. Condition. Effect
§ 640. Conditions. Liberal Construction
§ 641. Conditions. Illustrations of Liberal Construction

§ 642. Conditions Precedent and Subsequent
§ 643. Conditions Precedent Possible
§ 644. Charity Created by State
§ 645. Impossible or Illegal Conditions. Louisiana Holdings
§ 646. Impossible or Illegal Conditions. Other States
§ 647. Summary

CHAPTER XVII

Conflict of Laws.....Pages 447-456

§ 658. Beneficiaries in Other States. Validity
§ 659. Practical Difficulties
§ 660. Devises and Bequests. Situs. Validity
§ 661. Real and Personal Property. Difficulty in Distinguishing
§ 662. Personal Property. Domicile Deciding Factor
§ 663. New York Rule
§ 664. Situs of Real Property
§ 665. Which Court Is To Supervise
§ 666. Mortmain and Perpetuity Statutes
§ 667. Mortmain Provisions. Effect
§ 668. Express Authority to Take. New York
§ 669. Summary

CHAPTER XVIII

Tax Exemption.....Pages 457-535

§ 678. Old Practice
§ 679. Religious Charities
§ 680. Scope of Chapter
§ 681. Special Assessments
§ 682. License Fees
§ 683. Exemptions not Affected by Contract with Individual
§ 684. No Exemption by Estoppel
§ 685. Incorporation, Trustees, Foreign Corporations
§ 686. Rule of Strict Construction
§ 687. Reasons for the Rule of Strict Construction
§ 688. Illustrations of the Rule of Strict Construction
§ 689. Reasons for the Rule as Applied to Charities
§ 690. Limitations of the Rule of Strict Construction
§ 691. Limitations of the Rule. Constitutional Provision
§ 692. Strict and Liberal Construction. Two Lines of Authority
§ 693. Reasons for the Rule of Liberal Construction. Benefits to State
§ 694. Reason for Rule of Liberal Construction. Sense of Propriety
§ 695. Rule of Liberal Construction as a Fact
§ 696. Rule of Liberal Construction. Examples
§ 697. Special Charters. Liberal Provisions
§ 698. Special Charters. Liberal Provisions as Creating Contracts
§ 699. Special Charters. Offer and Acceptance. Consideration
§ 700. Statutes Do Not Create Contracts
§ 701. Charitable Purposes
§ 702. Purely Public Charities
§ 703. Purely Public Charities. Small Class of Beneficiaries
§ 704. Purely Public Charities. Denominational Control
§ 705. Held by or Belonging to a Charitable Institution
§ 706. Used or Occupied or Exclusively Used or Occupied
§ 707. Charitable Institutions. How Created. Character and Property
§ 708. Property Leased for Profit. General Reasoning

§ 709. Property Let for Profit. Analogy to Property of an Individual
§ 710. Property Let for Profit. Other Reasons
§ 711. Work by Beneficiaries
§ 712. Salaried Employees. Limitation Imposed on Physicians
§ 713. Payments by Beneficiaries as the Dominant Feature
§ 714. Incidental Payment by Beneficiaries
§ 715. Payments by Beneficiaries. Advantages
§ 716. Payments by Beneficiaries. Apportionment
§ 717. Payments by Beneficiaries. Surplus Receipts. Sanitarium
§ 718. Tuition and Other Payments
§ 719. Used or Exclusively Used. Incidental Use for Other Purposes
§ 720. Used or Exclusively Used. Examples of Incidental Use
§ 721. Used or Exclusively Used. Examples of Dominant Non-Charitable Use
§ 722. Used or Exclusively Used. Time As An Element
§ 723. Used or Exclusively Used. Devotion of the Profits to the Charity
§ 724. Used or Exclusively Used. Publishing House or Book Store
§ 725. School Property Exemption. Construction
§ 726. Teachers' Residence in School Building the Dominant Feature
§ 727. Teachers' Residence in a School Building as an Incident
§ 728. Residence of Teachers in Houses Owned by the School
§ 729. House Must Be Owned by the School and Must Not Be Leased to the Teacher
§ 730. Meaning of the Word College
§ 731. Opportunities for Recreation
§ 732. Farm Lands of Agricultural Schools
§ 733. Farm Lands of Non-Agricultural Schools. Exemption
§ 734. Farm Land By Non-Agricultural School. Taxation
§ 735. Summer Homes, Clubs, Camp Meetings
§ 736. Property of a Charity Widely Separated
§ 737. Intersection by Street or Highway. Exemption.
§ 738. Intersection by Street, River, Railroad Track, etc. Taxation
§ 739. Wild and Unimproved Land
§ 740. Vacant Lots
§ 741. Land on Which a Building is Being Erected. Burned Building
§ 742. Temporary Buildings
§ 743. Abandoned Buildings
§ 744. Occupancy by Roomers, Lodgers, etc.
§ 745. Use of the Property of an Individual Without Compensation
§ 746. Use of Private Property Leased to a Charitable Institution
§ 747. Property Held by a Charity Under a Long-Term Lease
§ 748. Property Let by a Charity for Profit
§ 749. Leases to Subsidiaries of a Charitable Institution
§ 750. Leases to Other Charitable Institutions
§ 751. Apportionment. General Situation
§ 752. Apportionment. Practical Difficulties
§ 753. Endowment Funds. Investment. Generally
§ 754. Endowment Fund. Form of Exemption
§ 755. Endowment Fund. Form of Property
§ 756. Endowment Fund. Investment
§ 757. School Exemptions. Liberal Policy

§ 758. School Exemption. Liberality Not Unlimited
§ 759. School Exemption. Stock Corporation
§ 760. Y. M. C. A. Properties
§ 761. Club Rooms of Fraternal Orders
§ 762. Greek Letter Fraternity Houses
§ 763. Cemeteries. General Situation
§ 764. Cemeteries. Tests of Exemption. Dedication
§ 765. Cemetery. Extent of Use for Graves
§ 766. Cemetery. Distinct Tracts of Land Not Yet Used
§ 767. Cemeteries. Improvements.
§ 768. Cemeteries. Mausoleums
§ 769. Cemeteries. Personal Property
§ 770. Cemeteries. Sale of Lots
§ 771. Secret Societies. Exemption
§ 772. Masonic Lodge. Not a Religious Organizaition
§ 773. Secret Societies. Not Purely Public Charities
§ 774. Homes Maintained by Secret Societies
§ 775. Secret Societies. Insurance
§ 776. Inheritance Tax. Distinguished from Other Taxes
§ 777. Inheritance Tax. Liberal Construction. General Principles
§ 778. Inheritance Tax. Liberal Construction. Illustrations. Almshouse
§ 779. Inheritance Tax. Liberal Construction. Limitation
§ 780. Inheritance Tax. Power to Discriminate Against Foreign Charities
§ 781. Inheritance Tax. Exempted by Law
§ 782. Inheritance Tax. Power to Exempt Foreign Charities
§ 783. Inheritance Tax. Corporation Active Beyond Its Own State
§ 784. Inheritance Tax. Not Exempt
§ 785. Inheritance Tax. General Provisions. Foreign Corporations.
§ 786. Inheritance Tax. Property in the Hands of Trustees
§ 787. Inheritance Tax. Charitable Institution
§ 788. Inheritance Tax. Educational Institutions
§ 789. Inheritance Tax. Religious Purposes
§ 790. Summary. Statutes. Construction.
§ 791. Summary. Commercial Uses
§ 792. Summary. Apportionment. Intermittent Use. Endowment Funds
§ 793. Summary. Publishing House. Teacher's Residence. Roomers
§ 794. Summary. Cemeteries. Secret Societies. Foreign Corporations
§ 795. Summary. Inheritance Taxes

CHAPTER XIX

Damage Liability ..... **Pages 536-559**

§ 798. English Cases
§ 799. Public Corporations
§ 800. Non-Charitable Bodies
§ 801. Contracts
§ 802. Property Used for Profit
§ 803. Nuisance
§ 804. Trust Fund Theory
§ 805. Negligence in Selecting Servants
§ 806. Negligence of Subordinate Servant
§ 807. Pay Patients
§ 808. Trust Theory Insufficient

§ 809. Respondeat Superior Rule
§ 810. Waiver Theory
§ 811. Patient as Employer
§ 812. Employment Must Be Shown
§ 813. Distinction Well Established
§ 814. Railroad Hospitals
§ 815. Injury to Employees
§ 816. Strangers
§ 817. Invitees
§ 818. Workmen's Compensation Acts
§ 819. Federal Courts
§ 820. Summary

APPENDIX

Suggestions For And Practical Forms of Charitable Devises And Bequests.....Pages 561-570

I. General Suggestions

1. Gift to Corporation
2. Name of Donee
3. States which Bar Gifts to Individuals in Trust
4. Discretion of Trustees
5. Power and Trust
6. General and Special Intention
7. Mortmain Statute
8. Perpetuity Statutes
9. Non-Technical Words. Humane, Philanthropic, etc.
10. Conditions, Reverter Clause
11. Religious Charities
12. Real and Personal Property
13. Gift to Class
14. Directions to be General
15. Unincorporated Society
16. Verbal Understandings

II. Forms

1. Preamble
2. Gift to Corporation in Existence
3. Gift to Corporation to be Organized
4. Gift to Trustee
5. General and Special Intent
6. Appointment of Visitors
7. Annuity Provision
8. Seat of Charity
9. Memory Perpetuation
10. Insufficiency
11. Mortmain Provision
12. Non-Charitable Purposes
13. Reversion and Cy Pres Application
14. Accumulation

III. Gifts for Masses

Gift to Priest
Gifts to Bishop in Trust
Gift to Incorporated Church
Gift to Other Corporation

TABLE OF CASES

(References are to pages)

Abbott, In re 222
Academy of Fine Arts v. Philadelphia 460, 462
Academy of Protestant Episcopal Church v. Hunter 472, 483
Academy of Richmond County v. Bohler 474, 477, 512
Academy of Sacred Heart v. Irey 496, 497
Academy of Science, State v. 140, 199
Academy of the Visitation v. St. Clemens 98, 113, 437
Ackerman v. Fichter 134, 170, 177, 178, 235, 321, 323, 424, 430
Acklin v. Paschal 435
Adams, State v. 419
Adams v. Bohon 73, 75, 116
Adams v. Page 85, 118, 376
Adams v. Perry 227, 380
Adams v. University Hospital 156, 188, 544, 551
Adams County v. Catholic Diocese 467, 508
Adams Female Academy v. Adams 76, 78, 95, 109, 203, 440
Addison, State v. 144
Adye v. Smith 47, 80, 123, 235, 267, 268, 269, 287
Adelphi College v. Wells 485
Adelphia Lodge v. Crawford 509
Alabama Conference M. E. Church South v. Price 415
Albany College v. Monteith 202
Albuquerque Board of Education v. School District 63, 153, 201
Alden v. St. Peter's Parish 152, 161, 169
Alford, In re 432
Alfred University v. Hancock 156, 530
Allen, State v. 517
Allen, In re 413, 513
Allen v. Duffie 161
Allen v. McKean 203, 329, 419, 420
Allen v. Nasson Institute 77, 107, 109
Allen v. Stevens 33, 34, 35, 37, 133, 187, 351, 358
Allerton, In re 474
Almy v. Jones 126, 208, 367
Alston v. Waldon Academy 156, 544
Alstork v. Curry 404
American Academy v. Harvard College 77, 85, 153, 199, 314
American Asylum v. Phoenix Bank 155, 191, 205, 326, 417
American Bible Society v. American Colonization Society 229
American Bible Society v. American Tract Society 250
American Bible Society v. Marshall 344, 455
American Bible Society v. Wetmore ... 13, 47, 149, 319, 389, 412, 457
American Church Missionary Society v. Griswolt College 441
American Christian Mission Society v. Tate 223
American Colonization Society v. Gartrell 147
American Colonization Society v. Smith Charities 444
American Colonization Society v. Soulsby 146, 381, 438
American Printing House v. Dupuy 444
American Sunday School Union v. Taylor 489
American Tract Society v. Atwater 220, 247, 250, 251, 315
American Tract Society v. Purdy 453
Amherst Academy v. Cowls 153
Amherst College v. Amherst 493, 494, 496

(References are to pages)

Amherst College v. Ritch..... 355
Amory v. Amherst College.....152, 205
Amory v. Attorney General.....112, 187
Amos v. Jacksonville Realty and Mortgage Co..... 509
Anderson, In re.....254, 267, 310, 353
Anderson v. Brock..... 253
Andrew v. New York Bible and Prayer Book Society.....73, 175, 176, 228, 436
Andrews v. Andrews.....61, 165, 168, 170, 374, 378
Anniston City Land Co. v. State.....473, 485, 486
Antones v. Eslava..... 152
Appeal Tax Court v. Baltimore.....469, 519
Appleby v. Appleby..... 231
Arkansas Midland Rd. Co. v. Pearson..... 555
Armand v. Dumas..... 507
Armendarez v. Hotel Dieu..... 556
Armstrong v. Kittanning..... 471
Armstrong v. Wesley Hospital..... 540
Arnett v. Fairmount Trust Co..... 240
Arnot, In re..... 532
Arrowsmith, In re..... 104
Ashton v. Dashaway Ass'n..... 332
Ashuelot National Bank v. Keene..... 441
Associate Alumni v. General Theological Seminary.....77, 204, 418
Asylum v. New Orleans..... 468
Atkinson's Will, In re.....129, 172
Atkinson v. Union Presbyterian Board of Publication..... 259
Attorney General v. Bedard.....191, 427
Attorney General v. Briggs.....108, 118, 214
Attorney General v. Butler.....425, 429
Attorney General v. Clergy Society.....117, 191, 249
Attorney General v. Detroit..... 470
Attorney General v. Downing..... 71
Attorney General v. Dublin.....167, 168, 169, 292, 334, 403, 432, 435
Attorney General v. Dutch Reformed Protestant Church.....72, 75, 83, 398, 403, 427, 430
Attorney General v. Federal Street Meeting House..... 143
Attorney General v. Goodell..... 294
Attorney General v. Guise..... 174
Attorney General v. Jolly.....64, 81, 116, 126, 162, 175, 236, 242, 254, 311, 412, 429
Attorney General v. Kaskaskia Commons..... 182
Attorney General v. Lowell.....89, 185, 196, 329, 443
Attorney General v. Moore.....158, 185, 187, 189, 275, 406, 432
Attorney General v. Newberry Library..... 427
Attorney General v. Old South Society.....160, 292, 324
Attorney General v. Parker.....420, 429, 431
Attorney General v. Pauline Temporary Home.....57, 81
Attorney General v. Soule.....265, 284, 427
Attorney General v. Trinity Church.....135, 169, 428
Attorney General v. Union Society of Worcester.....174, 260
Attorney General v. Wallace.....50, 111, 172, 275, 276, 305, 427, 429, 431
Atwater v. Russell..... 226
Auburn v. Y. M. C. A.....510, 511
Auch, Succession of.....54, 184, 373
Auditor General v. Womens' Temperance Ass'n..... 509
Augusta v. Walton..... 403

(References are to pages)

Ausmus, State v. 316, 324, 331
Avery v. Home for Orphans of Odd Fellows of Pennsylvania 86
Avila v. New York 444
Ayers v. M. E. Church 29, 128, 176, 222, 228, 239, 346, 362, 395
Ayers v. Weed 414
Babb v. Reed 144, 146, 245
Babcock v. African M. E. Zion Society 110
Babcock v. Leopold Morse Home 505
Bachman v. Y. M. C. A. 550
Backes, In re 178
Bailey v. Kilburn 310
Bailey v. Lewis 158
Bailey v. Waddy 204, 238
Bainbridge Appeal 368
Baker v. Clarke 349
Baker v. Fales 167
Baker v. Smith 118
Balch v. Attorney General 152, 529
Baldwin v. Baldwin 168, 169, 202
Baltimore v. Grand Lodge 510
Baltzell v. Church Home and Infirmary 185, 225, 226, 227
Bancroft v. Maine Sanitarium Ass'n 84, 98, 276, 322, 374, 442
Bancroft Training School v. Haddonfield 468
Bangor v. Beal 324
Bangor v. Masonic Lodge 143, 146, 271, 460, 522
Bank of Commerce and Trust Co., State v. 378, 424
Banks v. Phelan 248
Banner v. Rolf 170, 184, 280, 292
Baptist Church v. Presbyterian Church 430, 437
Baptist Home of Monroe County v. Gardner 195, 272, 274
Barbee v. Dallas 489
Barber, People v. 495, 496, 497, 501
Barden v. Atlantic Coast Line R. Co. 138, 555
Barker v. Petersburg 214
Barker v. Wood 242
Barkley v. Donnelly 89, 290, 334, 347
Barnard v. Adams 91, 171, 432
Barnes v. Barnes 28
Barnes v. Providence Sanitarium 539
Barnum v. Baltimore 26, 204, 213, 333, 334, 392, 414, 440
Barnwell, In re 87, 138, 214
Barr v. Brooklyn Childrens' Aid Society 156, 551
Barr v. Weld 110, 437, 440
Barringer v. Cowan 527
Bartlett, In re 168, 169, 170, 194, 204, 205, 206, 216, 247, 370
Bartlett v. King 149, 171, 224, 247, 344, 425
Bartlett v. Nye 252
Barton, People v. 497, 502
Basabo v. Salvation Army 165, 557
Bascom v. Albertson 4, 16, 32, 73, 78, 79, 233, 283, 284, 327, 346, 361, 378, 380, 391
Bascom v. Nichols 380
Bates v. Bates 126, 133
Bates v. Palmetto Society 153, 203
Bates v. Sharon 459, 506
Bates v. Worcester Protective Department 539
Beall v. Drane 51, 80, 302, 405
Beall v. Fox 4, 7, 51, 173, 243, 247, 342, 393

(References are to pages)

Beardsley's Appeal....80, 87, 92
Beardsley v. Bridgeport....242, 291, 292, 293, 404
Beatty v. Kurtz....28, 152
Beaver, In re....36, 358
Beaver v. Filson....153, 393
Beaver County v. Geneva College....515
Beckwith v. St. Phillip's Academy....114
Beckwith v. St. Philip's Parish....3, 168, 169, 309, 387
Bedard, Attorney General v....191, 427
Bedford v. Bedford....235, 296, 339
Beekman, In re....300, 369
Beekman v. Bonsor....8, 31, 73, 75, 79, 240, 258, 278
Beekman v. People....30, 72, 75, 77, 104, 243, 300, 399
Bell County v. Alexander....67, 214
Bellows Free Academy v. Sowles....111, 326
Bemis v. Northwestern Trust Co....284
Benezet Joint Stock Ass'n, In re....144
Bennett v. Baltimore Humane Impartial Society....390, 443
Benton v. City Hospital....557
Berger v. University of New Mexico....485
Bernhardsville M. E. Church v. Seney....143, 428
Bethlehem Borough v. Perseverance Fire Co....55, 110, 154, 194, 332
Betts v. Betts....215, 228, 348, 358
Beurhans v. Cole....41
Beurhans v. Watertown....213, 215, 217, 334, 390, 399
Bible Society v. Pendleton....24, 25, 449
Bills v. Pease....129, 133, 137, 265
Big Stone Gap Iron Co. v. Ketron....554
Biglow v. Randolph....538
Bingham's Adm. v. Commonwealth....528
Birchard v. Scott....4, 109
Bird v. Merklee....223, 227
Biscoe v. Thweatt....61, 162, 247, 374
Bishop's Fund v. Eagle Bank....169, 417
Bishop Randall Hospital v. Hartley....156, 546
Black v. Ligon Harp. Eq....275
Blackbourn v. Tucker....45, 46
Blackman v. Houston....491
Blanchard, ex parte....136
Blenon, In re....144, 198, 404
Bliss v. American Bible....98
Bliss v. Linden Cemetery Ass'n....332, 373, 428
Bloomington Cemetery Ass'n v. Baldridge....502, 519
Bluehill Academy v. Witham....153
Blunt v. Taylor....262
Board of Assessors, State v....460, 468, 473, 488, 509, 512, 522
Board of Education v. Illinois....527
Board of Foreign Missions v. McMaster....68
Board of Foreign Missions v. Shoemaker....323, 392
Board of Home Missions v. New York....477
Board of Library Trustees of Hanford v. Board of Trustees of Hanford....397
Boardman v. Hitchcock....173
Boenhardt v. Lock....141, 444
Bogart, In re....226
Bolick v. Cox....201, 214
Bonard, In re....193, 348
Bond v. Home for Aged Women of Cedar Rapids....397, 402

(References are to pages)

Booe v. Vinson..... 302
Book Depository v. Church Room Fund.....26, 27, 138
Booth v. Baptist Church of Christ.....332, 381, 433
Boston v. Doyle.....190, 195, 218, 323, 324, 325, 335, 337, 365
Boston Lodge v. Boston..... 516
Boston Safe Deposit and Trust Co. v. Attorney General.....156, 540
Bosworth v. Kentucky Chautauqua Assembly.....470, 487
Botsford, In re..... 285
Bourne v. Keane..... 178
Bowden v. Brown.....95, 186
Bowditch v. Attorney General.....101, 135, 190, 193, 209
Bowdoin College v. Merritt.....351, 356
Bowman v. Domestic and Foreign Missionary Society.....35, 36, 311
Boyce v. St. Louis..... 346
Boyd v. Insurance Patrol of Philadelphia.....129, 329, 331, 539
Bragg v. Litchfield..... 94
Braucher, People v.....82, 96, 115, 164, 427
Brawner, State v..... 143
Brenaw Ass'n v. Harbison.....461, 465, 515
Brendle v. German Reformed Congregation..... 329
Brennan v. Winkler..... 302
Brewer v. University of North Carolina.....204, 431
Brewer v. American Missionary Ass'n..... 483
Brewster v. McCall.....408, 409, 411, 412
Brice v. All Saints Memorial Chapel.....91, 99, 111, 153, 165, 428
Bridgeport Public Library v. Burrough's Home.....48, 116, 117, 206, 438, 441
Bridgeport Trust Co. v. Marsh..... 98
Bridges v. Pleasants.....80, 167, 240, 284, 389
Briggs, Attorney General v.....108, 118, 214
Brigham v. Peter Bent Brigham Hospital.....103, 231, 233, 279, 290, 328, 366, 382, 422, 451
Brinsmade v. Beach.....161, 173, 249, 394
Bristol v. Bristol.....102, 266, 284
Bristol Baptist Church v. Connecticut Baptist Convention....99, 439
Brodie v. Fitzgerald..... 488
Bronson v. Strouse.....183, 275, 282, 290, 293, 301, 370
Brooke v. Shacklett.....22, 23, 152
Brooklyn, People v.....433, 477
Brooklyn Children's Aid Society v. Prendergast..... 458
Brooklyn Church Society v. Brooklyn Free Kindergarten Society. 366
Brooks v. Belfast.....84, 139, 334, 374
Brookville v. Startzell.....134, 296
Browers v. Fromm.....177, 180
Brown, In re.....39, 231
Brown v. Brown.....219, 364
Brown v. Caldwell..... 373
Brown v. Concord.....81, 219, 438
Brown v. Condit.....85, 92, 99, 100, 278
Brown v. Hummel..... 321
Brown v. Kelsey.....281, 319
Brown v. La Societe Francaise.....144, 539
Brown v. Meeting Street Baptist Society...94, 110, 111, 115, 438, 441
Brown v. Pancoast.....138, 206, 280
Brown v. Pittsburgh..... 521
Brown v. Porter..... 169
Brown v. Thompkins..... 416
Brown v. Vinalhaven..... 538

(References are to pages)

Brown v. Webb 145
Brown University v. Granger 461, 508
Bruce v. Central M. E. Church 127, 162, 542, 545, 547, 556
Bruere v. Cook 172, 317
Brundage, In re 86
Brunswick School v. Greenwich 514
Bryant v. McCandless 152, 169, 319
Buchanan v. Kennard 60, 126, 136, 140, 189, 236, 372
Buckley v. Monck 83, 90, 137, 143, 236, 286, 310, 319
Budd, In re 165, 206
Buell v. Gardner 193, 274, 285, 373
Bull v. Bull 301
Bullard v. Chandler 236, 273, 299, 393
Bullard v. Shirley 95, 103
Bullock, In re 448
Burbank v. Burbank 216, 432
Burbank v. Whitney 17, 448, 449
Burd Orphan Asylum v. School District 187, 472
Burdell v. St. Luke's Hospital 551
Burgess v. Peth 435
Burke, Succession of 53, 54, 307
Burke v. Burke 102, 156, 178, 244, 248, 265, 370
Burke v. Roper 80, 144, 237
Burnham, In re 393, 422, 467
Burr v. Boston 216, 459
Burr v. Smith 4, 6, 14, 62, 166, 177, 236, 245, 247, 390, 423
Burrill v. Boardman 378, 381
Busbee v. Thomas 321
Busby v. Mitchell 167
Butler, Attorney General v. 425, 429
Butler v. Berry School 545, 547
Butler v. Green 285, 300, 451
Butler v. Parochial Fund 36, 222
Butterworth v. Keeler 259, 381
Button v. American Tract Society 407, 411
Byers v. McCartney 253, 358
Cahoon, People v. 462
Calhoun v. Furgeson 202, 310
Cameron's Estate, In re 413
Camp v. Crocker 305, 364
Camp v. Presbyterian Society of Sackets Harbor 104, 206
Campbell v. Clough 314
Campbell v. Kansas City 104, 108, 152, 436
Candia v. French 334
Capen v. Skinner 442
Carl, Appeal of 353
Carleton College, State v. 465, 483, 494, 497, 500, 501
Carleton v. Roberts 203, 310, 411
Carlisle County v. Norris 436
Carpenter v. Historical Society 208
Carpenter v. Miller 222
Carpenteria School District v. Heath 152
Carroll County Academy v. Gallatin Academy 152
Carson v. Carson 330
Carter v. Balfour 62, 80, 251
Carter v. Eaton 533
Carter v. Patterson 486, 491
Carter v. Story 529, 533

(References are to pages)

Carter v. Whitcomb
.....132, 139, 143, 144, 156, 157, 524, 528, 529, 531, 532
Carteret Academy v. State Board..... 479
Cary v. Abbot..... 73
Case v. Hasse.....92, 138, 310, 448
Casey, State v..... 520
Cashano v. Ursuline Academy.....468, 491, 496, 497,
Cassel, Ex parte.....146, 324, 363, 425
Castle v. Castle..... 266
Castleton v. Langdon.....152, 393
Cathedral St. John v. Denver.....470, 481
Cathedral of St. John v. Arapahoe County.....467, 490, 492
Catholic Church of Taylorville v. Offcutt.....161, 409
Catholic Church v. Tobbein..... 254
Catholic Knights v. Effingham County..... 523
Catholic Womans' Club v. Green Bay.....470, 499
Catlin v. Trinity College..... 528
Catron v. Scarritt Collegiate Institute.....98, 135, 137, 204
Catt v. Catt.....36, 252, 339
Centenary College v. Hubbs..... 477
Centennial and Memorial Ass'n of Valley Forge, In re.....
.....123, 138, 218, 331
Central St. Louis Masonic Hall Ass'n, State v..... 522
Central Union Conference Ass'n, In re.....473, 497
Chamberlain v. Chamberlain.....343, 348, 357, 450, 452
Chamberlain v. Stearns.....268, 269
Chambers v. Baptist Education Society....147, 263, 420, 426, 427, 430
Chambers v. Higgins.....252, 343
Chambers v. St. Louis.....
.....3, 4, 7, 11, 19, 60, 133, 146, 217, 235, 262, 298, 335, 342, 349
Chandler v. Board of Education of Person County.....213, 337
Chapin v. Holyoke Y. M. C. A..... 539
Chapin v. School District (N. H.)...168, 169, 201, 313, 334, 405, 438
Chapin v. School District (Ohio).....312, 313, 334, 414
Chapman v. Newell.....
.....122, 129, 134, 138, 149, 212, 214, 218, 312, 369, 373, 401
Charles v. Hunnicutt.....21, 190, 392
Charlesbank Homes v. Boston..... 506
Chase v. Dickey.....165, 168, 174, 312, 344, 349
Chase v. Stockett.....26, 187, 243
Chatham, State v..... 497
Chatham v. Brainerd.....47, 152, 373
Chatham v. Sisters of Charity..... 493
Cheatham v. Nashville Trust Co.....187, 328, 344
Chegary v. Jenkins..... 487
Chegary v. New York..... 514
Chicago Theological Seminary, People v..... 461
Chicago Theological Seminary v. People..... 462
Chicago v. Baptist Theological Union..... 458
Chicago Theological Seminary v. Illinois.....461, 464
Chicago v. University of Chicago..... 495
Children's Hospital, Appeal of..... 278
Children's Seashore House v. Atlantic City..... 505
Chittenden v. Chittenden.....228, 248, 251
Christ Church v. Trustees of Donations and Bequests.....
.....94, 161, 175, 366, 422, 437
Christian v. Catholic Church of St. John.....86, 115
Christian Church v. Church of Christ..... 247

(References are to pages)

Church Charity Foundation v. People..... 526
Church Extension M. E. Church v. Smith.....26, 221, 225, 370, 453
Church of Christ v. Reorganized Church of Jesus Christ....403, 435
Church of Good Shepard v. Commonwealth..... 475
Church of St. Monica v. New York..... 491
Cincinnati College v. State.....476, 488
City Guard Ass'n v. Scranton..... 485
Clarion v. Central Savings Bank.....215, 364, 430, 443
Clark, In re..... 358
Clark v. Oliver.....153, 421, 437
Claypool v. Norcross..... 303
Clayton v. Hallett.....61, 137, 217, 220, 232, 261, 262, 293, 296
Clement v. Hyde.....199, 262, 325, 430
Clergy Society, Attorney General v.....117, 191, 249
Cleveland Library Ass'n v. Pelton.....475, 510, 511
Cleven, In re.....187, 283, 305, 320, 358, 373, 403
Close Estate 371
Cobb v. Denton.....162, 320
Codman v. Brigham.....86, 320, 382
Coe v. Washington Mills.....143, 153
Coffin v. Attorney General.....263, 316
Coggeshall v. Home for Friendless Children..... 348
Coggeshall v. Pelton.....134, 218
Cogswell, People v.....140, 152, 156, 205, 236, 272, 375, 427, 438
Coit v. Comstock.....
.....110, 169, 220, 233, 237, 261, 287, 289, 370, 371, 379, 391
Colbert v. Speer.....149, 208, 263, 277, 278, 280, 284, 315, 358, 415
Coleman, In re.....132, 137, 193, 335, 373
Coleman v. Fire Insurance Patrol of New Orleans.....195, 539
Coleman v. O'Leary.....
.....50, 51, 170, 175, 177, 240, 262, 284, 292, 293, 296, 321, 368
Collector of Taxes v. Oldfield.....218, 219, 373, 383
Collier, In re..... 36
Collins v. Davis.....305, 384
Collins v. New York Post-Graduate Medical School and Hospital
.....156, 191, 548
Connor v. Trinity Reformed Church..... 226
Colorado Seminary v. Arapahoe..... 512
Columbian University v. Taylor.....205, 238
Commonwealth v. Berea College.....487, 495
Commonwealth v. Board of Education M. E. Church..... 475
Commonwealth v. Gray's Trustees..... 475
Commonwealth v. Hamilton College.....475, 509
Commonwealth v. Hampton Institute..... 497
Commonwealth v. Levy.....23, 108, 277, 339
Commonwealth v. Lexington Cemetery Co..... 520
Commonwealth v. Louisville Trust Co.....160, 191
Commonwealth v. Lynchburg Y. M. C. A.....466, 506
Commonwealth v. Parr.....138, 187
Commonwealth v. Pollit..... 443
Commonwealth v. Smallwood Memorial Institute.....487, 497
Commonwealth v. Thomas..... 471
Commonwealth v. Y. M. C. A.....128, 515
Community of Priests of St. Basil v. Byrne.....110, 366
Comstock v. Boyle..... 297
Cone v. Wold..... 444
Conner v. Sisters of the Poor.....156, 547
Congregation Shaarai Shomayim v. Moss..... 259

(References are to pages)

Congregational Church in Union Village, In re..... 435
Congregational Home Missionary Society v. Van Arsdale..... 414
Congregational Society v. Newington..... 435
Congregational Sunday School and Publishing Society v. Board of Review.....137, 138, 489
Congregational Unitarian Society v. Hale.....225, 372, 450
Conklin v. Davis.....170, 292, 311, 323, 347
Conklin v. John Howard Industrial Home.....478, 548
Connecticut College for Women v. Calvert.....329, 425
Cook v. John C. Norton Memorial Infirmary..... 540
Cook v. Universalist General Convention.....173, 241
Cook County v. Chicago Polyclinic..... 474
Cooney, Matter of..... 358
Cooper Hospital v. Burdsall..... 502
Cooper Hospital v. Camden (68 N. J. Law 691).....469, 473
Cooper Hospital v. Camden (70 N. J. Law 478)..... 503
Corbett v. St. Vincent's Industrial School.....194, 538
Corbin v. Am. Industrial Bank and Trust Co.....525, 527
Corbin v. Baldwin..... 525
Corbin v. Glenwood Cemetery.....309, 373
Corbin Y. M. C. A. v. Commonwealth..... 515
Corle, In re..... 370
Corley v. American Baptist Home Mission Society..... 542
Corporation Commission v. Oxford Seminary Construction Co... 473
Cory Universalist Society v. Beatty.....86, 169
Cothran, People v..... 202
Cottman v. Grace.....33, 222, 224, 323
County Commissioners v. Colorado Seminary.....469, 512
Cowan, In re.....57, 81
Cozart v. Manderville..... 225
Craig v. Secrist.....214, 294
Crawford, In re.....165, 319, 527, 530, 533
Crawford v. Mound Grove Cemetery..... 244
Crawford v. Nies.....105, 161, 427
Crawford v. Thomas.....50, 165
Creer v. Belknap..... 413
Creighton, In re.....306, 429
Crerar v. Williams.....61, 88, 103, 137, 206, 273, 376, 380
Cresson v. Cresson.....157, 158, 184, 187, 291, 341
Cresson's Appeal.....135, 204, 208, 216, 414
Crim v. Williamson.....137, 161, 247, 252, 284
Crisp v. Crisp.....26, 148, 225
Cromis v. Louisville Orphan's Home Society.....50, 75, 249, 392, 411, 413, 448
Crompton's Will, In re.....36, 239
Crow v. Clay County.....91, 109, 118, 128, 129, 135, 140, 214, 296, 391, 437
Croxall, In re.....186, 390, 412
Cruikshank v. Home for the Friendless.....100, 381
Crum, In re..... 36, 451
Crum v. Bliss.....278, 453
Cruse v. Axtell.....145, 252, 315
Cumberland Lodge v. Nashville.....471, 521
Cumberland University v. Caldwell..... 80
Cumming v. Reid Memorial Church.....131, 133
Cummings v. Dont.....172, 428, 435
Cumru Twp. v. Directors of Poor..... 471
Cunningham, In re.....34, 285, 400

(References are to pages)

Cunningham v. Sheltering Arms....156, 547
Curling v. Curling....214, 242
Curran, Appeal of....57, 203, 367
Currier v. Dartmouth College....203, 557
Currin v. Fanning....229, 332, 358
Curtis, In re....62, 465, 524, 525, 526
Curtis v. Androscoggin Lodge....473, 486
Curtis and Barker v. Central University....73, 84
Curtis Estate....205, 531
Cushman v. Church of the Good Shepherd....131
Da Costa v. De Pas....73
Dailey v. New Haven....217, 297, 313, 317, 400, 427
Daly, In re....108, 157, 187, 235, 236, 286, 320, 532
Dammert v. Osborn....34, 447, 449, 452
Danforth v. Oshkosh....42, 329, 381, 388
Daniel v. Fain....171, 247
Darcy v. Kelley....299, 317
Dart, Ex parte....434
Dartmouth College v. Woodward....202, 329, 468
Dascomb v. Marston....173, 206, 233, 296, 297
Dashaway Ass'n, People v....123, 193, 240
Dashiell v. Attorney General....25, 26, 51, 222
Davidge Will, In re....196, 204, 383
Davidson College v. Chambers....348
Davin v. Kansas Medical Missionary Ass'n....540, 548
Davis, In re....123, 285
Davis Will, In re (156 App. Div. 911)....37
Davis v. Barnstable....214
Davis v. Treasurer....530
Dayton v. Speers Hospital....481
De Bruler v. Ferguson....294, 321
De Camp v. Dobbins....138, 147, 170, 174, 270, 271, 348, 414
Decker v. Vreeland....365
De Lamar's Estate, In re....349, 358, 525
De La Pole v. Lindley....187
Delaware County v. Sisters of St. Francis....169, 471, 498, 500
Delaware County Institute v. Delaware County....471
Deming, In re....37
Denville Twp. v. St. Francis Sanitarium....460, 481
De Pontabla v. New Orleans....439
Derby v. Derby....48, 87, 241, 242
De Silver, In re....279
Detroit, Attorney General v....470
Detroit Home and Day School v. Detroit....463, 514
Detroit Young Mens' Society v. Detroit....509
Detwiller v. Hartman....133, 138, 368, 370
De Vaux College v. Highlands Land Co....111
De Witt v. Chandler....98
De Wolf v. Lawson....330
Dexter v. Gardner....59, 247, 248
Dexter v. Harvard College....134, 135, 199, 204, 299, 384
Dickinson College v. Cumberland County....493, 496
Dickson v Montgomery....66, 75, 172, 203, 238, 387, 414
Dickson v. United States....219
Didion, In re....533
Dille, In re....514
Diocese of East Carolina v. Diocese of North Carolina....338
Dirlam v. Morrow....273, 323

(References are to pages)

Dispensary and Hospital Society, People v. 437
District of Columbia v. Washington Market Co. 28, 297
Dodge v. Williams 41, 220, 230, 237, 247, 262, 342, 344, 390, 396
Dol, In re 328
Domestic and Foreign Missionary Society, Appeal of 173, 290, 303, 387, 413, 441
Domestic and Foreign Missionary Society v. Gaither 69
Donchian's Estate, In re 89, 226, 452
Donnelly v. Boston Catholic Cemetery 539
Donohugh's Appeal 471, 472
Doughten v. Vandever 15, 64, 75, 134, 137, 213, 330, 387
Douglas, In re (Reyer v. Potter) 120, 252, 303, 330
Downes v. Harper Hospital 156, 547
Downing, Attorney General v. 71
Downing v. Marshall 31, 248, 345, 346, 347, 351, 378
Doyle v. Whalen 78, 82, 142
Draper v. Harvard College 346, 448, 451, 452
Drennan v. Agurs 372
Drew v. Wakefield 66, 274, 301
Driscoll v. Hewlett 370, 371
Drury v. Natick 127, 206, 325, 334, 419, 437
Dublin, Attorney General v. 167, 168, 169, 292, 334, 403, 432, 435
Duggan v. Slocum 47, 187, 206, 262, 288, 315, 382, 391
Duke v. Fuller 145, 312, 332, 436
Dulaney v. Middleton 284
Dulles, In re 268, 271, 280, 303
Dumfries v. Abercrombie 26, 336, 449
Duncan v. Findlater 536
Duncan v. Nebraska Sanitarium Benevolent Ass'n 156, 548
Dunham v. Averill 410
Dunn v. Morse 278, 280
Dupont v. Pelletier 88, 164, 317
Durand, In re 227, 232
Durkee v. Smith 355
Durrell v. Belding 153, 331
Dutch Reformed Protestant Church, Attorney General v. 72, 75, 83, 398, 403, 427, 430
Dye v. Beaver Creek Church 184, 254, 292, 317
Dykeman v. Jenkines 103, 132, 189, 217, 236, 298, 314, 322, 336, 375, 393, 400
Earle v. Wood 152
East Hill Cemetery Co. v. Thompson 539
Eastman v. Allard 404
Easum v. Bohon 436
Eaton v. Woman's Home Missionary Society 106, 447, 448
Eccles v. Rhode Island Hospital Trust Co 257
Eccles v. Rhode Island Trust Co 124, 252, 325, 413
Edgerly v. Barker 77
Edmonds v. San Antonio 491
Effray v. Foundling Asylum 229, 412
Ege v. Hering 100, 225, 227, 366
Egleston v. Trust Co. of Georgia 283, 376
Eighmy v. Union Pacific R. Co 554
Elcan v. Lancasterian School 425
Elks Theatre Co. v. New Iberia 487
Ellenherst v. Pythian 189, 405
Eliot's Appeal 133, 148, 167, 173, 174, 187, 260, 262, 287, 298, 312
Eliot v. Trinity Church 105, 153, 208

(References are to pages)

Elliott v. Quinn....213, 310
Elliston, State v.... 331
Elizabeth, State v.... 511
Ely v. Attorney General.... 112
Ely v. Ely.... 450
Ely v. Megie.... 249, 254
Emerson v. Milton Academy....475, 490, 492, 496
Emory and Henry College v. Shoemaker College.... 397
Enaut v. McGuire.... 504
Englewood School v. Chamberlain.... 514
Engstad v. Grand Forks County.... 473
Episcopal Academy v. Philadelphia....131, 154, 156, 479, 481
Eppig, In re.... 178
Erhardt v. Baltimore Monthly Meeting.... 227
Erie County v. Bishop.... 504
Erskine v. Whitehead....60, 75, 76, 121, 128, 134, 138, 236, 262, 269
Estate of Purcell.... 355
Eureka Stone Co. v. First Christian Church.... 161
Eustace v. Dickey....115, 276, 418, 428, 489
Eutaw Place Baptist Church v. Shively.... 226
Evangelical Association, Appeal of....249, 252, 330, 410, 413
Evangelical Baptist Benevolent and Missionary Society v. Boston 471
Everett v. Carr....138, 145, 267
Fairbanks v. Lawson....170, 172, 302, 408, 410, 411
Fairchild v. Edson....285, 354, 355, 356, 358
Fairfield Township v. Ladd....337, 338
Fairview Heights Cemetery Co. v. Fay....460, 517
Farmers' and Merchants' Bank v. Robinson....169, 364, 400
Farmers' Loan and Trust Co. v. Ferris.... 208
Farmers' Loan and Trust Co. v. Shaw.... 357
Farrigan v. Pevear....187, 544, 546, 548, 550, 551
Farrington v. Putnam.... 349
Faulkner v. National Sailor's Home.... 407
Fay, In re.... 528
Fay v. Howe....280, 288, 295
Fectner, People v.... 504
Federal Street Meeting House, Attorney General v.... 143
Fellows v. Minor....232, 322, 449
Female Association v. Beekman.... 430
Ferguson v. Hedges.... 345
Fernald v. First Church of Christ Scientist in Boston....325, 451
Ferrell v. Penrose.... 490
Fidelity Insurance Trust and Safe Deposit Co., Appeal of.... 161
Field, In re.... 532
Field v. Drew Theological Seminary....127, 171, 233, 244
Field v. Girard College.... 433
Fifield v. Van Wyck....24, 234
Finch v. Board of Education.... 538
Fink v. Fink....53, 233, 292, 373, 445
Finnen's Estate, In re.... 523
Fire Insurance Patrol v. Boyd...122, 128, 130, 135, 138, 195, 543, 550
First Congregational Church v. Henderson.... 348
First Congregational Society v. Atwater....321, 334
First Congregational Society v. Trustees of Funds in Raynham.. 161
First Congregational Society of Bridgeport v. Bridgeport....
....80, 99, 111, 112, 391
First Baptist Church v. Robberson....401, 440
First Presbyterian Society v. Bowen....248, 413

(References are to pages)

First Society M. E. Church of Newark v. Clark.....38, 39, 235
First Universalist Society v. Bradford..... 529
First Universalist Society v. Fitch..... 252
Fisher, In re.....368, 370
Fisk, In re..... 530
Fisk University, State v.....466, 478, 497
Fitch, People v..... 433
Fite v. Beasley.....368, 370
Fithian, Mary S., Night School v. College Board of Presbyterian Church.....323, 428
Fitterer v. Crawford.....475, 522
Fitzsimmons, In re.....36, 416
Flaherty, In re.....93, 299, 439
Fleming, State v..... 427
Flood v. Ryan..... 355
Fontain v. Ravenel.....1, 9, 15, 278, 450
Fontanella v. New York Central Railroad Co..... 552
Foss, In re..... 525
Foote v. Sharpley..... 222
Ford, In re..... 222
Ford v. Ford.....129, 147, 370
Ford v. Kendall Borough School District.....537, 538
Ford v. Thomas.....84, 107
Fordham v. Thompson.....124, 155
Fordyce v. Woman's Christian National Library Ass'n.....18, 120, 206, 207, 387, 402, 424, 545, 548, 557
Forest Hill Cemetery Co. v. Creath..... 520
Forrester, In re..... 526
Ft. Des Moines Lodge v. Polk County..... 513
Fosdick v. Hempstead.....33, 134, 217, 334
Fox, In re..... 219
Fox v. Gibbs.....237, 268, 269, 271
Foy v. Coe College..... 503
Frain, In re..... 530
Fralick v. Lyford.....36, 225
Francis, In re..... 532
Francis v. Preachers' Aid Society.....153, 375, 430
Franklin, Succession of..... 53
Franklin v. Armfield...111, 131, 133, 199, 221, 230, 297, 301, 373, 388
Franklin v. Boone..... 282
Franklin v. Hastings.....134, 206, 375, 393, 443
Franklin v. Philadelphia.....190, 195, 212, 218, 287, 365
Franklin Square House v. Boston.....295, 506
Franklin Street Church, In re..... 85
Frazier v. St. Luke's Church.....172, 312, 317, 318
Frederick County v. Sisters of Charity.....461, 510
Freedman's Aid and Southern Education Society v. Scott..... 421
French v. Association for Works of Mercy..... 194
French v. Calkins.....133, 161, 244, 272, 364, 370, 378
French v. Lawrence.....72, 292, 298, 319
Frick's Estate, In re..... 462
Frierson v. General Assembly Presbyterian Church.....66, 173, 327
Frost v. Emanuel..... 357
Fuller, In re.....79, 234
Fuller, Will of.....41, 43
Funk's Estate.....114, 301
Gable v. Sisters of St. Francis..... 547
Gafney v. Kenison.....241, 301

(References are to pages)

Gagnon v. Wellman 88
Galesburg Sanitarium v. Jacobson 539
Gallego v. Attorney General 21, 22
Gallon v. House of Good Shepherd 194, 542
Galveston, Harrisburg and San Antonio Railroad Co. v. Scott 555
Gambell v. Trippe 26, 278
Gardner v. McNeal 414
Garrison v. Little 126, 134, 138, 209, 295, 316, 365
Gartland v. New York 557
Gary Library v. Bliss 117
Gass v. Ross 214, 409
Gass v. Wilhite 50, 154, 157, 164, 165, 176, 298, 347, 374
Gay, In re 368, 369
George v. Braddock 127, 148, 209, 210
Georgia Mausoleum Co. v. Dublin 520
Georgia Northern Railway Co. v. Ingram 555
Gerard, State v 49, 297, 319, 367
Gerick v. Gerick 267, 283, 284
Gerke v. Purcell 135, 154, 202, 471, 474
Germain v. Baltes 186, 343
German Aged People's Home v. Hammerbacker 156, 187
German Corporation v. Negaunee German Aid Society 270
German Evangelical Protestant Cemetery v. Brooks 519
German Gymnastic Ass'n v. Louisville 467
German Hospital v. Cook County 481
German Land Association v. Scholler 220
German Pioneer Verein v. Meyers 413
Gewin v. Mt. Pilgrim Baptist Church 153
Giblin v. Giblin 371, 411
Gibson v. Armstrong 152
Gibson v. Frye Institute 131, 210
Gibson v. McCall 281
Giddings v. Gillingham 413
Gidley v. Lovenberg 90, 187, 288, 293, 316, 320, 375, 389, 401
Gill v. Attorney General 94, 233, 267
Gilman v. Burnett 84
Gilman v. Hamilton 106, 149
Gilman v. McArdle 178
Gilmer v. Gilmer 216
Gilmore v. Lee 153, 178
Girard v. New Orleans 213
Girard Trust Co. v. Russell 153, 219, 384, 390
Girl's Industrial Home v. Fritchey 154
Girr v. Aaron 177
Gitzhoffen v. Holy Cross Hospital Ass'n 188, 539
Given v. Shouse 269, 304
Gladding v. St. Mathews Church 95, 97, 162
Glavin v. Rhode Island Hospital 536, 548, 553
Glover v. Baker 138, 165, 173, 252, 313, 325
Goddard v. Pomeroy 222, 228, 239
Godfrey v. Hutchins 199, 263, 274, 279, 280, 305
Going v. Emery 59, 306
Goldberg v. Home Missions 172, 405
Gooch v. Association for Relief of Aged Indigent Females 154
Goodale v. Mooney 65, 269, 289
Goode v. McPherson 98, 110
Goodell, Attorney General v 294

(References are to pages)

Goodell v. Union Ass'n of Childrens' Home
.....138, 156, 170, 279, 297, 416
Goodfellow, In re..... 171
Goodman v. Brooklyn Hebrew Orphan Asylum..... 545
Goodrich, Appeal of.....281, 292, 314, 379
Goodrich, In re..... 281
Gorham v. Ministerial Fund..... 513
Gould v. Board of Home Missions.....172, 238, 312, 388
Gould v. Whitman.....242, 243
Gouverneur Village v. Gouverneur Cemetery Ass'n..... 458
Grace Church v. Ange..... 113
Graceland Cemetery Co., People v.....501, 519
Graham's Estate, In re.....165, 168, 357
Graham v. Alden.....227, 298
Grand Lodge v. Burlington.....476, 488
Grand Lodge v. Moultrie County.....486, 523
Grand Lodge v. Taylor..... 473
Grand Prairie Seminary v. Morgan.....89, 90, 101, 201, 310
Grandom, In re.....83, 263, 274
Grant v. Saunders.....69, 76, 135, 189, 279, 304
Graves, In re.....131, 137, 193, 212, 216, 524, 531
Gray, In re..... 249
Gray v. Craig.....467, 520
Gray v. Peter Gray Orphans' Home..... 26
Gray Street Infirmary v. Louisville.....480
Green v. Allen.....4, 8, 10, 11, 16, 18, 49, 65, 69, 127, 176, 254
Green v. Biggs..... 539
Green v. Blackwell.....81, 109, 422
Green v. Fidelity Trust Co.....129, 290, 293, 310, 390, 391, 447, 528
Green v. Old People's Home.....366, 441
Green Bay Lodge v. Green Bay..... 576
Greenbush Cemetery Ass'n v. Van Natta..... 520
Greene v. Dennis..... 426
Greene v. Hogan..... 370
Greenville v. Mason..... 337
Greer College, People v.....436, 442
Greer v. Synod Southern Presbyterian Church.....172, 271, 390
Griffin v. Graham.....7, 16, 49, 258, 296, 363, 367, 375, 389
Griffin, Matter of.....37, 224, 227
Griffith, State v.....7, 10, 11, 236, 237, 277, 293, 313, 342, 363, 376
Griffith v. State.....10, 11, 18, 314, 317, 342, 373, 387
Griffiths v. Cope.....110, 111
Grim v. Williamson..... 374
Grimes v. Harmon.....
.....18, 60, 72, 75, 76, 238, 239, 240, 241, 250, 264, 302, 408
Grimke v. Attorney General..... 107
Grissom v. Hill.....114, 163, 393
Griswolt College v. State.....493, 501
Groot, In re.....263, 286
Grundy v. Neal.....437, 441
Guild v. Allen.....257, 312
Guilfoil v. Arthur..... 187
Guise, Attorney General v..... 174
Gumbert, Appeal of.....104, 151, 161
Gumble v. Pfluger..... 284
Gymnastic Ass'n v. Milwaukee.....509, 510, 511

Haas v. Missionary Society..... 547
Hadden v. Dandy.....165, 249

(References are to pages)

Hadley v. Forsee....2, 166, 235, 278, 287, 391
Hagen v. Sacrison....63, 235, 242, 258, 262, 296, 310, 373, 375, 377, 393, 453
Hagenmeyer, In re....175, 177, 178, 284
Haggin v. International Trust Co..61, 132, 139, 216, 333, 335, 373, 390
Haggerty v. St. Louis, K. & N. Ry. Co....137, 555
Haines v. Allen....192, 260
Hall v. Grand Lodge.... 414
Hallgarten, In re.... 229
Halsey v. Convention of Protestant Episcopal Church....26, 226, 313
Hamburger v. Cornell University....11, 129, 155, 224, 300, 483, 540, 551, 552, 557
Hamden v. Rice....121, 218
Hamilton, In re....164, 180, 568, 569
Hamilton v. Mercer Home....291, 426
Handley, In re.... 118
Handley v. Palmer....22, 69, 203, 334, 450
Hanson v. Little Sisters of the Poor....170, 226, 349
Hanway v. Galveston.... 554
Happy v. Morton.... 422
Hardin v. Rock Springs Lodge.... 486
Hardson v. Elden.... 370
Hardy v. Waltham.... 508
Harrington v. Pier....8, 41, 42, 77, 79, 129, 135, 137, 140, 193, 236, 289
Harris v. American Bible Society....224, 357
Harris v. Neal.... 244
Harris v. Slaght.... 357
Harrisburg v. Harrisburg Academy....479, 481
Harrisburg v. Hope Fire Co....95, 194
Harrison v. Brophy....63, 174, 175, 180
Hart v. Taylor....136, 188, 189, 478
Harter v. Johnson....157, 189, 261, 280, 290
Hartford v. Hartford Theological Seminary.... 469
Hartman v. Pendleton....86, 410, 432
Hart's Will, In re....205, 225
Hartung, In re....290, 375, 404
Harvard College v. Cambridge....493, 506
Harvard College v. Kettell.... 500
Harvard College v. Society for Promoting Theological Education....93, 104, 105, 153, 427
Harvard College v. State.... 460
Hathaway v. New Baltimore....38, 109, 116, 150, 274, 334
Hathaway v. Sackett....213, 214
Haverford College v. Davis....463, 471
Haverford College v. Rhoads....472, 495, 496
Hawes Place Congregational Society v. Hawes Fund.... 274
Hayden v. Connecticut Hospital....80, 85, 295
Hayes v. Lawrence County.... 510
Hayes v. Pratt.... 305
Haynes v. Carr....64, 123, 201, 236, 241, 281, 302, 304
Hays v. Harris....25, 237, 268
Haywood v. Craven....128, 148
Hazeltine v. Vose....187, 411
Hearns v. Waterbury Hospital....331, 546, 550, 553
Hebrew Benevolent and Orphan Asylum v. New York.... 465
Hebrew Free School Ass'n v. New York.... 507
Heddleson, In re....91, 299

(References are to pages)

Hegeman v. Roome 271
Heiskel v. Trout 234
Heiskell v. Chickasaw Lodge 220, 293, 303, 312, 317, 327
Heisler v. Methodist Protestant Church 440
Heiss v. Murphey 43, 72, 221
Helpers of Holy Souls, Society of, v. Law 178
Henderson v. Henderson 327, 364
Henderson v. McCullagh 514
Henderson v. Strangers' Rest Lodge 475
Hennepin County v. Bell 507
Hennepin County v. Brotherhood Gethsemane 481
Henry v. Michigan Sanitarium 324
Heriot's Hospital v. Ross 536
Herr, In re 525, 526
Herron v. Stanton 208, 366, 392, 443
Hesketh v. Murphy 64, 259, 262, 297
Hester v. Hester 289
Heuser v. Harris 4, 61, 82, 87, 214, 238, 245, 297, 322, 350
Hewett v. Woman's Hospital Aid Ass'n 189, 537, 544, 556
Hewitt v. Wheeler School and Library 161, 370
Hibernian Benevolent Society v. Kelly 459, 471, 476, 511
Hickock, In re 523, 528
Hicks v. Providence 110, 269, 435
Higginson v. Turner 335, 336
Hill v. McGarvey 112
Hill v. Tualatin Academy 156, 202, 203, 542
Hill's Estate, In re 147
Hilliard v. Parker 155, 294, 370, 374
Hillyard v. Miller 380, 384
Hinkley, In re 62, 81, 137, 163, 167, 236, 260, 271, 272, 357, 367, 375, 389, 401
Hinkley v. Thatcher 161
Hitchcock v. Board of Home Missions 171, 172, 261, 319
Hoboken v. North Bergen Twp 518, 519
Hodge v. Wellman 78, 104, 107, 392
Hodgson v. Hodgson 282
Hodnett, In re 355
Hoeffer v. Clogan 61, 127, 131, 132, 137, 175, 177, 178, 569
Hoffen, In re 302, 319
Hoke v. Glenn 545, 546
Holland v. Alcock 33, 79, 178, 179, 222, 285, 313
Holland v. Peck 69, 73, 75, 163, 311
Holland v. Smyth 179, 341, 361
Holden v. Cook County 397
Holder v. Massachusetts Horticultural Society 541
Holifield v. Robinson 334, 369
Hollis v. Drew Theological Seminary 224, 358, 453
Hollywood Cemetery Co. v. Commonwealth 520
Holman v. Renaud 143
Holmes v. Coates 294, 297
Holmes v. Mead 33, 346, 365
Home for the Education of Feeble Minded Children v. Landis 467
Honk's Estate, In re 245, 352
Hood v. Dorer 169
Hooper v. Shaw 531
Hope Cemetery Ass'n v. Rose 485
Hopkins v. Crossley 39, 373

(References are to pages)

Hopkins v. Grimshaw....144, 364
Hopkins v. Upshur....67, 153, 162
Hordern v. Salvation Army....542, 544, 549, 557
Hornbeck v. American Bible Society....229, 248, 405, 415
Hornberger v. Hornberger....297, 372
Hornberger v. Miller....348
Horton v. Colorado Springs Masonic Bldg....464, 485, 522
Horton v. Tabitha Home....156
Hosmer v. Detroit....134, 216
Hospital of St. Vincent v. Thompson....156, 557
Hot Springs School District v. Sisters of Mercy....476, 481
Hotel Dieu v. Armendarez....541, 556
House of Refuge v. Smith....478
Houston v. Scottish Rite Benevolent Ass'n....145
Howard, In re....532
Howard v. American Peace Society....66, 297, 319, 402
Howard v. Howard....132, 169, 262
Howe, In re....226, 332
Howe v. Wilson....61, 267, 281, 305
Howell v. New Hope Benevolent Society....326
Hoyt v. Bliss....91, 135, 204, 401
Hubbard v. Worcester Art Museum....97, 103, 344, 349
Huger v. Protestant Episcopal Church....121, 233
Hughes v. Daly....169, 302, 318
Hughes v. Stoutenburgh....357
Hull v. Pearson....34, 229
Hullman v. Honcomp....430
Humane Fire Co., Appeal of....194, 332
Humphreys v. State....163, 523, 530
Humphries v. Little Sisters of the Poor....329, 459, 471
Hunt v. Edgerton....99, 203, 261, 262, 305, 315, 391
Hunt v. Fowler....16, 61, 75, 221, 235, 277
Huntington, In re....524
Huntington v. Swedish Baptist Home....499
Huntsville v. Smith....286, 334
Huss, In re....448
Huston v. Dodge....370
Hutchins v. George....207
Hyde v. Hyde....199, 266, 429

Ihmes, In re....350, 352, 356, 358
Illinois Central Ry Co. v. Buchanan....555
Incorporated Society v. Richards....18
Indianapolis v. Grand Lodge....144, 286, 287, 292, 463, 465, 488, 522
Indianapolis v. McLean....514
Indianapolis v. Sturdevant....514
Inerny v. St. Luke's Hospital....156
Ingersoll, In re....285
Ingleside Ass'n v. Nation....63, 187, 430
Inglish v. Johnson....109, 220, 296, 318
Inglis v. Sailor's Snug Harbor....100, 187, 233, 394
Ingraham v. Ingraham....188, 302, 375, 376, 382, 384, 400
Institute of Holy Angels v. Bender....483, 504
Institution for Savings v. Roxbury Home....187, 196, 295, 380
I. O. O. F. v. Scott....510
Ireland v. Geraghty....153
Isaacs v. Emory....26
Isbell, In re....229
Iseman v. Myers....214, 229, 382

(References are to pages)

Jackson, In re 271
Jackson, ex dem, Lynch v. Hartwell 334
Jackson v. Hammond 345, 347
Jackson v. Phillips 74, 85, 90, 103, 116, 128, 129, 135, 136, 147, 148, 149, 162, 191, 209, 210, 238, 367, 379, 400, 424, 427
Jackson v. Preston 474
Jackson v. Sisson 243
Jacobs v. Bradley 151, 412
Jacoby's Estate 405
Janey v. Latane 222
Jansen v. Godair 87, 115, 137, 187, 376, 378
Jeanes Estate 194, 410
Jenkins v. Berry 276, 390, 425, 426
Jensen v. Maine Eye and Ear Infirmary 156, 543, 552
Jocelyn v. Nott 378
Joel v. Woman's Hospital 547
John, In re 67, 75, 108, 212, 214, 215, 321, 377, 392
Johns v. Birmingham Trust and Savings Co 238
John v. Smith 202, 322
John's College v. New York 507
Johnson, In re 237, 268, 357
Johnson v. Bowen 189, 263
Johnson v. Chicago 557
Johnson v. De Pauw University 300
Johnson v. Holifield 7, 62, 137, 369, 371, 373
Johnson v. Hughes 178, 226, 414, 569, 570
Johnson v. Johnson 80, 258, 282, 321, 326, 327, 499, 502
Johnson v. Mason Lodge 467
Johnson v. Mayne 168, 169, 247
Johnson v. Osment 431
Johnston, State v 484, 491
Jolly, Attorney General v 64, 81, 116, 126, 162, 175, 236, 242, 254, 311, 412, 429
Jones Heirs v. Dorchester 107, 239, 254
Jones v. Green 269
Jones v. Habersham 52, 112, 133, 206, 207, 208, 272, 306, 349, 356, 366, 369, 370, 371, 377
Jones v. M. E. Sundayschool 231
Jones v. Patterson 149, 240, 283, 387
Jones v. Renshaw 57
Jones v. Watford 159, 320
Jones v. Williams Ambler 134
Jordan v. Richmond Home for Ladies 24, 412
Jordan v. Universalist General Convention Trustees 24, 448
Kahle v. Evangelical Lutheran Joint Synod 231
Kain v. Arizona Copper Co 554
Kain v. Gibbony 7, 22, 68, 166
Kansas City v. Kansas City Medical College 461
Kansas Education Ass'n, State v 488
Kansas Masonic Home v. Sedgwick County 523
Kappa Kappa Gamma House v. Pearcy 517
Kasey v. Fidelity Trust Co 173, 283, 364, 382, 402, 440
Kaskaskia Commons, Attorney General v 182
Kaufman v. Foster 146
Kavanaugh, In re 138, 175, 179, 526
Keech, In re 526
Keenan, In re 282
Keene v. Eastman 77, 82, 90, 99, 206, 215

(References are to pages)

Keith, In re....526, 532
Keith v. Scales....80, 170, 232, 259, 282, 310
Keleman, Matter of....355
Kellogg v. Church Charity Foundation....549, 550, 553, 554, 556, 557
Kelly, In re....525
Kelly v. Hoey....37
Kelly v. Love....23
Kelly v. Nichols....78, 95, 96, 129, 135, 137, 140, 141, 165, 173, 369, 380, 396
Kelly v. Welborn....103
Kelso v. Steiger....114
Kendrick v. Farquhar....467, 494
Kennedy v. Palmer....334, 450
Kent v. Dunham....300, 301
Kentucky Female Orphan School v. Louisville....475, 484
Kenyon College v. Schnebly....487, 492, 509
Kerlin v. Campbell....418
Kernan, Succession of....52
Kernochan v. Farmers' Loan and Trust Co....249
Kerr v. Dougherty....227, 229, 352, 358, 453
Kerrigan v. Connelly....166, 178, 416, 569
Kerrigan v. Tabb....178, 568
Kessler, In re....351, 389
Keys, People v....479
Kilpatrick v. Graves....45
Kimball v. Chappel....414
Kimberly, In re....523, 524
Kimberly's Estate....55, 156, 304, 433, 447
Kine v. Becker....188
King v. Grant....169, 415
King v. Horton....295
King v. Parker....145
King v. Rockwell....304
King v. Rundle....380
King v. Woodhull....245, 252
Kingman v. New Bedford Home....407
Kingsbury v. Brandegee....414, 416
Kingsley v. School Directors of Plum Twp....153, 324
Kingston v. Lehigh Valley Coal Co....436
Kinike, In re....264, 268, 303, 305
Kinnaird v. Miller....23, 231, 294, 336
Kinney v. Kinney....50, 391, 402
Kirk v. King....143
Kirkpatrick v. Rogers....253
Kirtley v. Spencer....305
Kitchen v. Pitney....185, 266, 290, 291, 295
Kittanning Academy v. Kittanning....507
Klemmerer v. Klemmerer....92, 106, 137, 186, 244, 249, 304, 320
Klumpert v. Vrieland....4, 68, 87, 319, 388, 389, 396
Knight, In re....159, 210
Knight v. Stevens....531
Knox College v. Knox County....493, 495, 503
Knox v. Knox....24, 25, 222, 373
Koblitz v. Western Reserve University....329, 419, 420, 430
Kochersperger v. Baptist Theological Union....509
Koppikus, In re....368, 370
Korsstrom v. Barnes....159, 241, 378
Kortright's Estate....349

(References are to pages)

Kramph's Estate....86, 108, 148
Kratz v. Slaughter.... 305
Krauthoff v. Attorney General.... 430
Kronshage v. Varrell....135, 136, 192, 291
Kurzman v. Lowy....204, 323, 452
Lackland v. Hadley....118, 216
Lackland v. Walker....
...60, 81, 83, 87, 89, 90, 105, 106, 109, 110, 113, 133, 206, 207, 422
Lacy v. Davis.... 487
Lafayette College, Appeal of.... 204
La Fevre, In re....525, 526
La Fontaine Lodge v. Eviston.... 520
La Grange County v. Rogers....7, 60, 217, 297
Laird v. Bass.... 321
Lakatong Lodge v. Franklin Township....109, 115, 429
Lake v. Hood.... 431
Lakewood Cemetery Ass'n, State v....486, 518, 519
Lane v. Eaton....44, 165, 226, 232
Langdon v. Plymouth Congregational Society....152, 437
Lange, State v....502, 519
Lanning v. Commissioners of Public Instruction....206, 314
Larkin v. Wikoff....100, 274, 428, 432
Laswell v. Hungate....94, 397, 401
Lathrop v. Commercial Bank....15, 50, 341, 342
Lawlor, People v.... 516
Lawrence v. Elliott.... 365
Lawrence v. Prosser....216, 259
Lawrence County v. Leonard....217, 303, 320
Lawson, In re....138, 144, 353
Leak v. Leak....165, 281, 288
Lear v. Manser.... 141
Leavell v. Arnold.... 527
Leavell v. Western Kentucky Asylum....538, 541
Le Couteulx v. Buffalo.... 334
Leeds v. Shaw....83, 214, 320
Leester, State v.... 511
Lefevre v. Lefevre.... 415
Lehnherr v. Feldman.... 218
Lennig, In re....366, 384
Lennon, In re....137, 177, 180, 351
Lenox, In re.... 526
Leonard v. Burr.... 380
Leonard v. Davenport.... 249
Lepage v. McNamara....69, 75
Leslie v. Marshall.... 232
Levy v. Levy.....5, 6, 8, 16, 17, 32, 234, 277, 309, 339, 346, 380, 454
Lewis, In re.... 81
Lewis v. Cornutt.... 249
Lewis v. Lusk....45, 147, 172, 213
Lewis Estate....149, 192, 306
Lichtentag v. Tax Collector.... 514
Life and Annuity Ass'n v. Shilling.... 513
Liggett v. Abbot....212, 214
Lightfoot v. Poindexter....200, 216, 259, 373
Lightner's Appeal.... 353
Lilly v. Tobbein....249, 254
Linde v. Packard.... 522
Lindley, ex parte.... 294

(References are to pages)

Lindler v. Columbia Hospital....189, 551
Linton v. Lucy Cobb Institute....466, 467, 478, 484
Literary Fund v. Dawson.... 230
Little v. Newburyport....122, 515
Little v. United Presbyterian Theological Seminary....464, 512
Little v. Willford.... 43
Litz v. Johnson....459, 460
Livesey v. Jones....137, 265, 278
Livingston v. Gordon....414, 443
Loch v. Mayer....32, 37, 79, 141
Lockwood v. Weed.... 413
Loeb, In re....191, 531
Loeffler v. Sheppard and Enrooh Pratt Hospital.... 544
Logan v. Agricultural Society....141, 539
Long Branch Firemens' Ass'n v. Johnson.... 513
Long, In re.... 91
Long v. Union Trust Co....60, 69, 115, 323, 378
Longheed v. Dykeman Baptist Church.... 232
Longport v. Bamberger Seashore Home.... 504
Look, In re.... 225
Loomis v. Mack.... 39
Loomis Institute v. Healy.... 391
Louis v. Gaillard....61, 77, 98, 258, 393
Louisville v. University of Louisville.... 329
Louisville v. Werne.... 506
Louisville Presbyterian Orphanage v. Chamber's Guardian.... 151
Lounsberry v. Square Lake Burial Ass'n.... 373
Love v. Nashville Agricultural and Normal Institute.... 542
Lowell, Attorney General v....89, 185, 196, 329, 443
Lowell, In re.... 325
Lowell v. Charlestown.... 294
Lower Dublin Academy, In re.... 109
Loyd v. Webster.... 315
Ludham v. Higbee....161, 167, 421
Lupton v. Leander Clark College....92, 98, 439
Lusk v. Lewis....45, 147
Lutheran Hospital Ass'n v. Baker.... 480
Lyford v. Laconia.... 161
Lyla v. National Home.... 538
Lynch v. Loretta....142, 354
Lynch v. South Congregational Parish of Augusta....77, 98, 207, 435
Lynn Workingmens' Aid Ass'n v. Lynn....474, 506
Lyon, In re....90, 369, 529

MacDowell, In re....
....37, 79, 83, 107, 124, 149, 150, 156, 159, 292, 295, 298, 299
MacKenzie v. Presbytery of Jersey City....
....64, 138, 152, 161, 373, 422, 426, 441
Mackey, In re.... 526
Mack's Appeal 164, 168, 169
Madison Academy v. Board of Education of Richmond.... 109
Magaw v. Huntley.... 132
Magee v. Genesee Academy.... 439
Magie v. German Evangelical Dutch Church.... 446
Magill v. Brown....6, 126, 141, 213, 249
Magnuson v. Swedish Hospital....536, 546
Maguire v. Macomb....275, 444
Maine Baptist Missionary Convention v. Portland....128, 172, 474
Mala v. Eastern State Hospital.... 538

(References are to pages)

Malcolm v. Ev. Luth. Hospital Ass'n..... 539
Manice v. Manice..... 452
Manley v. Fiske.....37, 326
Mann v. Mullin..... 374
Manners v. Philadelphia Library.....102, 148, 159, 207
Mannix v. Purcell.....3, 7, 152, 318, 323, 424
Mansfield v. Neff.....63, 250, 349
Marble v. Nicholas Senn Hospital Ass'n..... 557
Mars v. Gibert.....90, 109
Marsh v. Renton..... 264
Marshall v. Chittenden.....67, 233
Martin v. McCord..... 242
Martin Institute v. Maddox..... 323
Marx v. McGlynn..... 358
Mary, Succession of..... 54
Mary Franklin Home for Aged Women v. Edson..... 438
Mary Immaculate School v. Ossining.....495, 496, 497, 503
Mason v. Bloomington Library Ass'n.....98, 137, 208, 321, 369, 370, 372
Mason v. Massachusetts General Hospital..... 407
Mason v. Perry.....77, 145, 251, 266, 328, 396
Mason v. Tuckerton M. E. Church.....170, 217, 311, 312
Mason v. Zimmerman..... 486
Mason County v. Hayswood Hospital.....156, 189, 481
Masonic Education and Charity Trust v. Boston.....289, 293, 523
Masonic Temple Society, In re..... 522
Massachusetts General Hospital v. Armory..... 310
Massachusetts General Hospital v. Belmont.....461, 482
Massachusetts General Hospital v. Somerville.....494, 496
Massachusetts Institute of Technology v. Attorney General..131, 205
Massachusetts Society v. Boston.....193, 504
Massenburg v. Grand Lodge.....475, 476, 477, 510, 521
Mathurin v. Livaudais..... 52
Maught v. Getzendammer.....26, 284, 400
Mausoleum Builders v. State Board..... 519
Maxcy v. Oshkosh.....35, 106, 133, 333, 375, 403
Maxmilian v. New York..... 538
Mayer v. Society for Visitation of Sick.....144, 293
Maynard v. Woodward.....215, 223, 335
Maynes Estate, In re..... 531
Mayor v. Soloman Lodge..... 144
McAllister v. Burgess.....164, 172
McAllister v. McAllister.....294, 306, 416
McAuley v. Wilson.....80, 96
McBride v. Elmer.....296, 310
McCarroll v. Grand Lodge.....108, 432
McCartee v. Orphan Asylum Society..... 345
McCarthy v. Walsh..... 315
McCaughal v. Ryan.....6, 10, 88, 363, 399
McCloskey, Succession of.....53, 307
McCord v. Olchitree.....7, 59, 60, 171, 400, 424
McCoy v. Natick..... 370
McCran v. Kay.....138, 187, 194, 397
McCullough v. Bennett Medical College.....461, 473, 507
McCullough v. Board of Review..... 459
McDonald v. Massachusetts General Hospital.....156, 540, 547
McDonald v. Shaw.....111, 137, 201, 262, 409
McDonogh, State v.....3, 54, 82, 120, 139, 214, 237, 333, 445, 447
McDonogh v. Murdoch.....68, 93, 103, 106, 334, 375
McElwain v. Allen.....92, 398

(References are to pages)

McGee Presbytery v. Unknown Heirs of Smith..... 441
McGeehan, In re..... 244
McGirr v. Aaron.....310, 367, 413
McGlade, Appeal of..... 356
McGowen, State v.....49, 297
McGraw, In re..... 348
McHugh v. McCole.....79, 179, 247, 568
McInerny v. St. Luke's Hospital Ass'n..... 556
McIntire v. Zanesville.....90, 91, 95, 109, 338
McIntyre Poor School v. Zanesville Canal and Mfg. Co...3, 7, 10, 232
McKennan, In re..... 523
McKeon v. Kearney.....248, 381
McKeown v. Officer..... 357
McKevitt v. Sacramento.....328, 397
McKissick v. Pickle.....325, 442
McLain v. School Directors of White Twp.....152, 243
McLean v. Wade 161, 358
McLoughlin v. McLoughlin..... 304
McMillen, Appeal of..... 299
McNamara v. McNamara..... 371
McNeilly v. First Presbyterian Church..... 163
McPherson v. Byrne..... 284
McRoberts v. Moudy.....96, 153, 161
Meade v. Beale.....26, 68, 221
Medical College v. Rushing.....539, 548
Meeting Street Baptist Society v. Hail.....150, 316, 336
Mercantile Library Co. v. Philadelphia.....484, 510
Mercer Home for Disabled Clergymen, In re.....112, 113, 423
Mercersburg College v. Mercersburg Borough.....486, 498, 507, 514
Mercersburg College v. Poffenberger..... 479
Merchant, In re.....137, 188, 191, 391
Mercy Docks v. Gibbs..... 536
Mergentime, In re.....525, 532
Merrick Lodge v. Lexington..... 521
Merrill v. Hayden..... 435
Merritt v. Bucknam.....169, 364
Metairie Cemetery Ass'n v. Board of Assessors.....518, 521
Methodist Church v. Remmington.....73, 175, 439
Methodist Episcopal Church of Milford v. Williams....169, 281, 369
Methodist Episcopal Church South v. Hinton.....465, 471, 489
Methodist Episcopal Hospital v. Williams..... 414
Methodist Episcopal Protestant Church v. Adams..... 250
Methodist Episcopal Society v. Harriman.....111, 169
Methodist Home v. Philadelphia..... 501
Metzger Institute v. Cumberland County..... 493
Metzger, People v.....493, 494, 495, 496
Meunier, Succession of.....52, 53, 54, 120, 190, 191, 335, 393, 400
Michigan Sanitarium v. Battle Creek..... 512
Mikota v. Sisters of Mercy..... 547
Miles v. Fisher..... 309
Milford v. Worcester County.....460, 520
Millers' Appeal 471
Miller, In re.....171, 312, 527, 530
Miller v. Ahrens..... 68
Miller v. Atkinson.....80, 117, 220, 259, 296
Miller v. Chittenden...18, 68, 75, 99, 152, 161, 230, 231, 233, 235, 259
Miller v. Commonwealth..... 524
Miller v. Lerch..... 349
Miller v. Porter.....122, 129, 130, 131, 156, 157, 185
Miller v. Riddle..... 435

(References are to pages)

Miller v. Tatum 240
Miller v. Teachout 67, 165, 302, 305, 393, 430
Mull's Will, In re 85, 435
Mills v. Davison 161, 330, 373, 418
Mills v. Newberry 274, 314
Milne v. Milne 53, 54, 233, 288, 344
Munns v. Billings 143, 193, 207, 291
Minot v. Attorney General 137
Minot v. Baker 73, 279, 304
Minot v. Boston Asylum 415
Minot v. Parker 59, 271, 300
Minot v. Winthrop 528
Miriam Osborn Memorial Home Ass'n, In re 504
Mission Historical Society v. Academy of Science 7, 76, 110, 112, 140, 207, 208, 252
Mission of St. Vincent De Paul v. Brakely 499, 503
Missionary Society v. Humphreys 26, 381
Missionary Society of M. E. Church v. Calvert 225, 227
Missionary Society of M. E. Church v. Chapman 173
Mitford v. Reynolds 134
Mobile v. Kiernan 190, 458
Moggridge v. Thackwell 15
Moller, In re 301
Molly Varnum Chapter v. Lowell 208
Monaghan v. Joyce 304, 305, 403
Mong v. Roush 234
Montana Catholic Missions v. Lewis and Clark Counties 504
Montclair v. State Board of Equalization 483, 515
Montclair Military Academy v. Bowden 459
Montgomery v. Wyman 474, 514
Monticello Female Seminary v. People 497, 503
Monticello Seminary v. Madison County 511
Montpelier Seminary v. Smith 150, 153
Moore, In re 138, 157, 192, 525, 531
Moore, Attorney General v. 158, 185, 187, 189, 275, 406, 432
Moore v. Moore 10, 50, 76, 288, 296, 365, 371
Moore v. O'Leary 39, 262
Moran v. Moran 180, 240, 302
Moriarty v. Higginbotham 142
Morice v. Bishop of Durham 124
Mormon Church v. U. S. 71, 102, 103, 117, 154
Morning Star Lodge v. Hayslip 521
Morris, Matter of 177, 387
Morris v. Boyd 75, 92, 93, 431
Morris v. Lone Star Chapter 477
Morris v. Nowlin Lumber Co 186, 544
Morris v. Westminster College 469, 486
Morris v. Winderlin 111
Morrison v. Beirer 153, 316
Morrison v. Henke 550
Morristown Trust Co. v. Morristown 97, 133, 138, 440
Morrow v. Smith 144, 531
Morse v. Natick 371
Morton v. Smith 154
Morville v. American Tract Society 375
Morville v. Fowle 115, 170
Moseley v. Smiley 144, 237, 364
Moses, In re 532

(References are to pages)

Mott v. Danville Seminary 435
Mott v. Morris 110, 152, 161
Mount v. Tuttle 36, 79, 450
Mount Hermon Boys' School v. Gill 497, 498
Mount Pleasant Cemetery v. Newark 469, 502, 519
Mountainside v. Board of Equalization 499, 500
Muhlenberg Twp. v. Charles Evans Cemetery Co 477
Mullen v. Erie County 504
Mulliner v. Evangelischer Diakonissenverein 156, 547
Mundy v. Van Hoose 479
Murdock, In re 423
Murdock v. Eliot 275
Murphy, In re 271, 279
Murphy v. Dallam 221
Murray, In re 293, 296, 525
Murray v. Miller 36
Musser v. Musser 204
Muttaugh v. St. Louis 538
Myers v. Atkins 458, 473
Myers v. Benjamin Rose Institute 471, 511
Nance v. Busby 253
Nashville v. Ward 491
Nason v. First Bangor Christian Church 168
National Board of Christian Women's Board v. Fry 226
National Council of Knights of Security v. Phillips 512
National Finance Corporation v. Robinson 328, 441
National Jewish Hospital v. Coleman 407, 409, 411
Neale, In re 532
Needles v. Martin 222
Negley v. Devlin 136, 137
Negley v. Henderson 518
Nelson, People v 130, 196
Nelson v. Cushing 326, 418, 423
Nelson v. Monitor Congregational Church 430
Neptune Fire Engine and Hose Co. v. Mason County 128, 130, 137, 194, 332
Nevin v. Krollman 513
Newark v. Stockton 81, 116, 370
Newark v. Verona Twp 497, 500
Newberry Library, Attorney General v 427
Newberry v. Blatchford 428
New Castle Common v. Megginson 137, 139, 212, 216, 471, 473
Newcomb v. Boston Protective Department 195, 539
Newcomb v. St. Peter's Church 170
Newell's Appeal 204, 416, 446
New England Hospital v. Boston 504
New England Sanitarium v. Stoneham 122, 134, 135, 157, 292, 482
New England Theosophical Corporation v. Boston 487
New Haven v. Sheffield Scientific School 463, 508
New Haven Young Men's Institute v. New Haven 215, 259, 298, 334, 376
New Jersey Title Guaranty and Trust Co. v. Smith 138, 218
New London v. Colby Academy 490
Newmarket v. Smart 235, 253
New Orleans v. Baltimore 445
New Orleans v. Campbell Manning 460
New Orleans v. Congregation Dispersed of Judah 476
New Orleans v. Hardie 53, 396

(References are to pages)

New Orleans v. Mechanic's Society 207
New Orleans v. New Orleans Mechanic's Society 469, 477
New Orleans v. Pydras Orphan Asylum 469, 508
New Orleans v. Russ 508
New Orleans v. St. Anna's Asylum 488
New Orleans v. St. Louis Asylum 468
New Orleans v. St. Patrick's Hall Ass'n 510
New Orleans v. Salmen Brick and Lumber Co 333, 334
New Orleans Female Orphan Asylum v. Houston 469
New Orleans Mechanic's Soc. v. Harris Manning 467
New Standard Club v. McGowen 516
New York, People v 468, 495, 496
New York City, In re 517
New York Institution for the Blind v. How 412
New York Juvenile Guardian Society v. Roosevelt 433
New York Society for Prevention of Cruelty to Children, People v 141, 330, 433
Newport v. Masonic Temple Ass'n 521
Newson v. Starke 5, 7, 52, 69, 76, 80, 130, 137, 296, 303, 387
Newton v. Carberry 28, 180
Newton v. Lewis 433
Newton Academy v. Bank of Ashville 305, 311, 312, 435
Nicholas v. Evangelical Deaconess Home and Hospital 544, 547, 548
Nichols v. Allen 266, 320
Nichols v. Newark Hospital 98
Nicholson, Succession of 83
Nicholson v. Atchinson, Topeka and Santa Fe Hospital Ass'n 554, 555
Nilson, In re 5, 6, 63, 69, 236, 262, 319, 335, 406
Nixon v. Brown 139, 152, 211, 219, 391
Noble v. Hahneman Hospital 156, 537, 538, 550
Nobles County v. Hamline University 490
Nolfe v. Byrne 443
Nolte v. Meyer 242
Norcross v. Murphy 303
Norris v. Loomis 107, 292, 295
Norris v. Thomson 64
North Carolina Institute v. Norwood 408, 409, 410, 415
North Carolina School for Deaf and Dumb v. North Carolina Institute for Deaf, Dumb and Blind 148
North St. Louis Gymnastic Society v. Hudson 509
Northhampton County v. Lafayette College 483, 492, 493, 504
Northhampton County v. Lehigh University 487
Northwestern Publishing House v. Milwaukee 489
Northwestern University Assessment, In re 469
Northwestern University v. Hanberg 464, 469
Northwestern University v. People 468
Northwestern University v. Wesley Memorial Hospital 138, 150, 427
Norton, In re 423
Norton v. Louisville 459
Norton v. Valentine 440
Nourse v. Merriam 446
Novak v. Orphan's Home of Baltimore 26, 27, 375
Oak Hill Cemetery Co. v. Wells 517, 518
O'Brian v. Physicians' Hospital Ass'n 157, 419
Odd Fellows Building Ass'n v. Naylor 476, 488, 510
Odell v. Odell 101, 187, 295, 364, 378, 382, 384
Ogden, In re 132

(References are to pages)

Ogg v. Lansing 538
O'Hara v. Dudley 354, 356
Old South Ass'n v. Boston 462
Old South Society, Attorney General v. 160, 292, 324
Old South Society v. Crocker 142, 145, 164, 168
Oldfield v. Attorney General 383
Olliffe v. Wells 262, 263
Omaha Medical College v. Rush 514
O'Neill v. Odd Fellows' Home 187
Opinion of Justices, In re 117
Orford Union Congregational Society v. West Congregational Society 152, 169, 431, 432
Organized Charities Ass'n v. Mansfield 157, 396
Oronto v. Sigma Alpha Epsilon Society 516
Osenton v. Elliott 223, 448
Osgood v. Rogers 104, 115, 169
Ottawa University v. Franklin County 462
Ould v. Washington Hospital 5, 7, 18, 28, 76, 129, 139, 186, 229, 373, 376, 379, 380, 391
Ould v. Washington Hospital for Foundlings 232, 233, 364
Overholser v. National Home for Disabled Volunteer Soldiers 218, 538
Owatonna v. Rosebrook 214
Owens, In re 254
Owens v. Missionary Society 8, 9, 31, 141, 223, 248, 251, 268, 290, 318

Pace v. Jefferson County 505
Pack v. Shanklin 221
Paine v. Forney 107
Palmer v. Oiler 67, 129, 294, 391
Palmer v. Union Bank 210, 321, 366
Parish of Orleans, State v. 463, 491, 497
Park v. American Home Missionary Society 271
Parker, Attorney General v. 420, 429, 431
Parker, People v. 517
Parker v. Cowell 250, 252
Parker v. May 143, 427, 429
Parker v. Quinn 510
Parkhurst v. Treasurer and Receiver General 138, 208, 531
Parks v. Northwestern University 156, 203, 543, 547
Parson's Business College v. Kalamazoo 503, 514
Paschal v. Acklin 67, 132, 135, 287, 289, 297, 299, 358, 374, 392, 395, 454
Paterlini v. Memorial Hospital Ass'n 548, 550, 558
Patterson Rescue Mission v. High 191, 458, 478
Pauline Temporary Home, Attorney General v. 57, 81
Pawlet v. Clark 117, 246
Peabody, In re 103, 173
Pearson, In re 186, 277
Peaslee v. Rounds 404
Peasley v. McKean County Poor District 538
Peek v. Woman's Home Missionary Society 394, 442
Peirce v. Attwill 137, 219, 266
Pell v. Mercer 18, 49, 76, 91, 135, 237, 244, 269, 367, 388, 412, 414, 451
Pembroke Academy v. Epsom School District 109, 401
Penfield v. Skinner 324
Penick v. Thom 77, 91
Pennington v. Metropolitan Museum of Art 89

(References are to pages)

Pennoyer v. Wadhams.....5, 67, 129, 135, 137, 138, 161, 168, 169, 235
Pennsylvania Hospital v. Delaware County....487, 488, 499, 500, 505
Penny v. Croul.....39, 116, 213, 215, 217, 310, 336, 348
People v. Barber.....495, 496, 497, 501
People v. Barton.....497, 502
People v. Braucher.....82, 96, 115, 164, 427
People v. Brooklyn.....433, 477
People v. Cahoon..... 462
People v. Chicago Theological Seminary..... 461
People v. Cogswell.....140, 152, 156, 205, 236, 272, 375, 427 438
People v. Cothran..... 202
People v. Dashaway Ass'n.....123, 193, 240
People v. Dispensary and Hospital Society..... 437
People v. Feitner..... 504
People v. Fitch..... 433
People v. Graceland Cemetery Co.....501, 519
People v. Greer College.....436, 442
People v. Keys..... 479
People v. Lawlor..... 516
People v. Metzger.....493, 494, 495, 496
People v. Nelson.....130, 196
People v. New York.....468, 495, 496
People v. New York Society for Prevention of Cruelty to Children.....141, 330, 433
People v. Parker..... 517
People v. Peoria Mercantile Library Ass'n..... 509
People v. Powers.....36, 268, 271, 285
People v. Purdy.....497, 509, 510, 516
People v. Ravenswood Hospital..... 470
People v. Reilly.....501, 502
People v. St. Francis Xavier Female Academy..... 474
People v. St. James Xavier Female Academy..... 473
People v. St. Mary's Roman Catholic Hospital..... 185
People v. Sayles..... 510
People v. Simonson.....230, 231, 428
People v. Stillwell..... 485
People v. Tax Commissioners..... 209
People v. Western Seaman's Friend Society.....460, 530
People v. Woman's Home Missionary Society..... 530
People v. Y. M. C. A..... 510
Peoria Mercantile Library Ass'n, People v..... 507
Pepke v. Grace Hospital..... 548
Pepper, In re.....55, 401
Pepper's Estate.....397, 409
Percival, Succession of.....54, 161, 330
Perin v. Carey.....1, 6, 7, 67, 124, 135, 202, 293, 334, 342, 375
Perkins v. Siegfried..... 392
Perry v. House of Refuge.....194, 538, 544
Peter v. Carter.....94, 110
Petersburg v. Petersburg Benevolent Mechanics Ass'n....23, 144, 471
Petersen, In re..... 528
Peth v. Spear.....210, 238
Peynado v. Peynado.....118, 334, 401, 448
Phelps v. Pond.....31, 150, 234, 375
Phi Beta Epsilon Corporation v. Boston..... 517
Philadelphia, Appeal of..... 479

(References are to pages)

Philadelphia v. American Philosophical Society..... 466
Philadelphia v. Bicknell..... 160
Philadelphia v. Elliott..... 218
Philadelphia v. Fox.....213, 289, 334, 336, 339, 365
Philadelphia v. Girard.....82, 87, 90, 375, 380, 445
Philadelphia v. Jewish Hospital Ass'n..... 505
Philadelphia v. Keystone Battery.....218, 504
Philadelphia v. Ladies United Aid Society..... 501
Philadelphia v. Masonic Home..... 522
Philadelphia v. Overseers of Public Schools.....479, 509
Philadelphia v. Pennsylvania Hospital.....480, 482
Philadelphia v. University of Pennsylvania..... 508
Philadelphia v. Women's Christian Ass'n.....156, 484, 515
Philadelphia Baptist Ass'n v. Hart.....
.....5, 12, 21, 22, 25, 28, 68, 129, 221, 245, 246
Philadelphia Library Co. v. Donohugh.....121, 207, 464, 472
Philbrick, In re..... 285
Phillips v. Harrow.....133,
166, 191, 206, 207, 241, 290, 297, 313, 334, 335, 336, 373, 375, 377
Phillips v. Heldt.....369, 380, 387
Phillips v. St. Louis & S. F. R. Co..... 554
Phillips v. Sister Estelle..... 483
Phillips Academy v. Andover..... 492
Phillips Academy v. King.....326, 390
Phillips Exeter Academy v. Exeter.....476, 486
Pickering v. Shotwell.....207, 259
Pickle v. McKissick.....158, 325, 442
Pier v. Harrington..... 43
Pierce, Petition of.....150, 187
Pierce v. Attwill..... 59
Pierce v. Cambridge..... 494
Pierce v. Stevens..... 531
Pierce v. Union Pacific R. Co.....131, 189, 546, 555
Pierce v. Weaver.....260, 264, 293, 296, 310, 320, 321, 322, 439
Piper v. Moulton.....134, 214, 334, 369, 371, 379
Pirkey v. Grubb..... 23
Pitcher v. Miss Wolcott School Ass'n..... 514
Pitney v. Bugbee.....193, 208
Pittsburgh v. Home of the Friendless..... 503
Pittsburgh v. Mercantile Library Hall Co..... 510
Plant System Relief and Hospital Department v. Dickerson..... 555
Plattsmouth Lodge v. Cass County..... 522
Plymouth v. Jackson..... 337
Plymouth Society of Milford v. Hepburn.....231, 232, 450
Pocono Pines Assembly v. Monroe County.....499, 515
Poling v. San Antonio & A. P. R. Co..... 555
Pope v. Hinkley..... 414
Porter's Case 1, Coke 24a cited..... 4
Potter v. Chapin.....239, 248, 338, 439
Potter v. Pike..... 377
Potter v. Thornton.....48, 168
Potts' Will, In re.....35, 366, 367
Potts v. Philadelphia Ass'n for Relief of Disabled Firemen....
.....195, 242, 332
Pottsdown Hospital v. New York Life Insurance and Trust Co..
.....449, 453
Poulson, In re..... 353
Powell, In re..... 36

(References are to pages)

Powell v. Hatch....282, 304
Power v. Cassidy....284, 292
Powers, People v....36, 268, 271, 285
Powers, State v....138, 480, 481
Powers v. Massachusetts Homeopathic Hospital....
....154, 424, 536, 537, 541, 545, 547, 551, 554
Pownall v. Myers....111, 152, 334
Pratt v. Roman Catholic Orphan Asylum....221, 248, 450
Pratt Institute v. New York....469, 477
Preachers' Aid Society v. Rich....11, 66, 248, 298, 311, 414
Presbyterian Board of Foreign Missions v. Culp.... 57
Presbyterian Board of Relief v. Fisher.... 504
Presbyterian Theological Seminary v. People.... 501
President of the United States v. Dummond.... 339
Price v. Edwards.... 530
Price v. Maxwell....55, 129, 199, 204, 358
Price v. School Directors.... 425
Prichard v. Thompson....283, 285
Prickett v. People.... 323
Prime, In re.... 527
Prime v. Harmon....171, 272, 304, 310, 391
Princeton University v. Wilson....105, 202, 203, 404, 427, 440
Pringle v. Dorsey....72, 96, 100, 153
Printing House v. Trustees....423, 440
Proprietor's School Fund, Appeal of.... 324
Protestant Episcopal Education Society v. Churchman....
....6, 7, 21, 22, 23, 24, 138, 163, 223
Providence Athenaeum v. Tripp.... 532
Pulpress v. African M. E. Church....262, 276, 294
Purdy, People v....497, 509, 510, 516
Quaker Society v. Dickenson.... 147
Quimby v. Quimby....93, 95, 97
Quinn v. Shields....155, 304
Quirck, In re.... 530
Rader v. Stubblefield.... 187
Rady v. Fire Insurance Patrol of New Orleans....195, 539
Rainey v. Laing....226, 227, 348
Raley v. Umatilla County....152, 203, 214, 391, 400
Ramsey County v. Macalester College....493, 502
Ramsey County v. Stryker.... 483
Rankine v. De Veaux College.... 324
Rasquin, In re....217, 290
Ravenswood Hospital, People v.... 470
Read v. Willard Hospital.... 85
Read v. Williams....267, 285, 373
Reasoner v. Herman....78, 87, 299, 300, 361, 362, 382, 384, 394
Red v. Johnson.... 491
Red v. Morris.... 491
Reeves v. Reeves....124, 240, 253, 310
Reformed Dutch Church v. Brandow.... 228
Reformed Protestant Dutch Church v. Mott....15, 168
Reilly, People v....501, 502
Reilly, Succession of....55, 445
Rettew v. St. Patrick's Church....493, 497
Rex v. Portington.... 73
Reynolds Memorial Hospital v. Marshall County....138, 480, 506
Rhode Island Hospital Trust Co. v. Olney....
....49, 76, 85, 138, 149, 208, 240, 242, 282, 398, 402

(References are to pages)

Rhodes v. Maret....67, 153
Rhodes v. Rhodes....251, 253, 254
Rhodes v. Yates.... 162
Rhymer's Appeal.... 178
Ribet, Succession of.... 532
Rice v. Bradford.... 528
Rice v. Osgood.... 230
Rice County v. Bishop Seabury Mission....512, 513
Richards v. Church Home for Orphan and Destitute Children.... 312
Richards v. Wilson....
....100, 151, 152, 153, 156, 201, 315, 334, 388, 393, 437, 438
Richardson v. Carbon Hill Coal Co....189, 555
Richardson v. Essex Institute....133, 202, 207, 216, 313, 315
Richardson v. Mullery....83, 85, 298
Richmond v. Davis....319, 324, 387
Richmond v. Long.... 538
Richmond v. State....60, 126, 241, 319
Richmond County v. Tayloe.... 21
Richtman v. Watson....165, 393
Ridgely Lodge v. Redus.... 509
Riker v. Leo....158, 285
Rine v. Wagner....358, 403
Ripley v. Brown.... 382
Ritter v. Couch.... 218
Rizer v. Perry....26, 221
Roach v. Hopkinsville....77, 93
Robb v. Washington and Jefferson College....359, 379, 452
Robbins v. Boulder County....294, 302, 318, 375, 444
Roberts v. Corson....289, 293
Robinson, In re....35, 201, 217, 271, 290, 295, 400, 531
Robinson v. Crutcher....60, 76, 138, 309, 316, 540
Roche, In re.... 402
Rockefeller, In re.... 531
Roe and Wright v. Seaford.... 333
Rogers v. Rea.... 278
Rohrbaugh v. Douglas County.... 511
Rolfe and Rumford Asylum v. Lefebre....113, 329, 366, 373, 432
Rollins v. Merrill....314, 370
Rong v. Haller.... 234
Roosen v. Peter Bent Brigham Hospital....540, 544, 547
Rose v. Rose....378, 380, 381
Rose v. Rose Benevolent Ass'n.... 377
Rosehill Cemetery Co. v. Kern....519, 520
Ross, State v....493, 501, 509
Rotch v. Emerson....93, 205
Rothchild, In re....529, 530
Rothchild v. Goldenberg.... 428
Rothschild v. Schiff....261, 263, 281, 311
Rothschild v. Wise.... 37
Roy v. Rowzie....23, 225, 226, 243, 448, 452
Royal Highlanders v. State.... 523
Royer's Estate, In re....107, 150, 204, 214
Rush County v. Dinwiddie....113, 218, 261, 333, 364
Rushmore v. Rushmore....214, 217, 323
Rusk, State ex rel Heddons v....104, 426
Russell v. Allen....68, 202, 233, 377
Russell v. Providence....190, 260
Rust v. Evenson....172, 174, 187, 203, 237

(References are to pages)

Ruth v. Oberbrunner....40, 42, 225, 247, 254, 374, 399
Rutherford v. Ott....178, 247, 372, 569
Ryan v. Porter.... 110
Safford v. Fogler.... 431
Sage v. Commonwealth....162, 528
Sailor's Snug Harbor v. Carmody....34, 35, 111, 427
St. Albans Hospital v. Town of Enosburg.... 481
St. Barnabas Hospital, State v.... 498
St. Bridget Convent v. Milford....496, 498
St. Edwards College v. Morris.... 498
St. Elizabeth Hospital, In re....473, 481
St. Francis Xavier Female Academy, People v.... 474
St. George's Church Society v. Branch....168, 225, 359
St. James Church v. Wilson.... 96
St. James Educational Institute v. Salem.... 509
St. James Orphan Asylum v. Shelby..7, 63, 75, 220, 289, 303, 304, 391
St. James Xavier Female Academy, People v.... 473
St. John v. Andrew Institute....36, 230, 231, 356, 357
St. John's Military Academy v. Edwards....464, 514, 515
St. John's Military Academy v. Larson.... 524
St. Joseph's Hospital Ass'n v. Ashland County.... 483
St. Joseph's Orphan Society v. Wolpert....151, 187, 190
St. Louis v. Crow.... 146
St. Louis v. McAllister.... 105
St. Louis Lodge v. Koeln.... 516
St. Luke's Home v. Indigent Female Ass'n.... 411
St. Mary's College v. Crowl.... 498
St. Mary's Roman Catholic Hospital, People v.... 185
St. Michael's Church, In re....116, 161, 422, 428, 429
St. Paul's Church v. Attorney General.152, 161, 206, 382, 383, 384, 400
St. Paul's Sanitarium v. Williamson.... 546
St. Peter's Church v. Brown....76, 249
St. Peter's Roman Catholic Congregation v. Germain.... 348
St. Vincent College v. Schaefer.... 469
Salem Lyceum v. Salem.... 487
Salem Marine Society v. Salem.... 459
Salt Lake Lodge v. Groesbeck....144, 465, 486
Saltonstall v. Sanders....271, 273, 367, 393
Salvation Army in United States v. American Salvation Army... 165
San Antonio v. Salvation Army....163, 165, 493
Sanderson v. White....59, 82, 326, 387, 438
Sandusky v. Sandusky....168, 169, 275, 305, 438
Santa Clara Female Academy v. Sullivan....373, 448
Sappington v. Sappington School Fund.... 305
Sargent v. Cornish....148, 200, 209, 260
Saunders, In re.... 532
Savannah v. Solomon Lodge.... 523
Sawdey v. Spokane Falls & N. R. Co.... 554
Sawtelle v. Witham....41, 237, 279, 305, 313
Sawyer v. Dearstyne....37, 295
Saxton v. Mitchell.... 116
Sayles, People v.... 510
Sayre, In re.... 383
Schier v. Burr....317, 448
Schier v. St. Paul's Church....174, 311
Schleicher, In re....267, 301
Schloendorff v. New York Hospital.... 552
Schmidt v. Hess....167, 249, 371

(References are to pages)

Schmucker v. Reel....179, 239, 262, 265, 284, 320, 424
Schnack v. Larned.... 328
Schneider v. Kloepple....250, 411
School Directors v. Dunkelberger.... 203
School District v. Fuess.... 213
School District of Ft. Smith v. Howe.... 488
School Trustees of Hoboken v. Hoboken....151, 202, 206, 334
Schouler, ex parte....178, 273, 279, 320
Schulz's Appeal.... 354
Scott, State v.... 463
Scott, In re.... 36
Scott v. All Saints Hospital....135, 471, 481
Scott v. Marion Twp....147, 297
Scott v. St. Johnsbury Academy....486, 513
Scott v. Stipe.... 161
Scottish Rite Bldg. Co. v. Caster County....146, 522
Scranton City Guard Ass'n v. Scranton.... 218
Scrimger, In re....98, 315
Seaburn v. Seaburn....22, 23, 222
Seaford v. Wright.... 335
Seagrave, Appeal of....281, 389
Sears v. Attorney General....153, 164, 289, 294
Sears v. Chapman....92, 242
Seaside Home v. State Board of Taxes.... 499
Seattle v. Chin.... 471
Second Congregational Society v. First Congregational Society....96, 104, 242
Second Religious Society v. Harriman....115, 198
Secrest Estate, In re....206, 230, 405
Seda v. Huble....165, 180, 247
Seibert, Appeal of....175, 180
Seibert's Appeal.... 178, 527
Seif v. Krebs....111, 115, 364
Seitz v. Seitz.... 57
Seitzinger v. Becker.... 324
Selleck v. Thompson....304, 322
Sellers Methodist Episcopal Church, In re.... 437
Sessions v. Doe.... 46
Settegast, State v.... 474
Sewall v. Cargill.... 168
Seymour, In re.... 36
Shanahan v. Kelly....44, 179, 222, 226
Shand's Estate, In re....249, 397
Shapleigh v. Pilsbury....153, 162, 169, 230, 318
Shattuck, In re....34, 36, 202, 238, 239, 265, 285
Sheldon v. Chappell.... 328
Sheldon v. Stockbridge....218, 297, 336
Sherbourne v. Yuba.... 537
Sheren v. Mendenhall.... 196
Sherman v. Congregational Home Missionary Society....87, 156, 187
Sherman v. Richmond Hose Co....98, 127, 133, 194, 218, 328
Sherman v. Shaw....150, 290, 297
Sherrill v. Christ Church.... 527
Sherwood v. American Bible Society....141, 248, 346, 448
Shipman v. Rollins....231, 254, 412
Shotwell v. Mott....4, 30, 41, 248, 284, 319, 363, 364
Sickles v. New Orleans....68, 100, 438
Silcox v. Harper....118, 438, 452

(References are to pages)

Silsby v. Barlow 249
Simcoke v. Sayre 521
Simmons v. Burrell 33, 36, 249
Simmons v. Hunt 303, 431
Simonson, People v. 230, 231, 428
Simpson v. Welcome 126, 127, 134, 138, 167, 173
Sioux Falls Lodge v. Mundt 144, 504
Sisters of the Blessed Sacrament, In re 498
Sisters of Charity v. Detroit 459, 461, 467, 473
Sisters of Charity v. Emery 365
Sisters of Third Order v. Peoria 478, 482, 484, 500, 502
Skinner v. Harrison 201, 334, 409
Skinner v. Northern Trust Co 61, 137, 327, 374
Slattery v. Ward 178, 265
Smart v. Durham 214, 243, 311, 375
Smith, State v. 425
Smith, In re 216
Smith v. Chesebrough 381, 400
Smith v. Gardiner 238, 260, 311, 390
Smith v. Havens Relief Fund Society 224, 225, 353
Smith v. Heyward 364, 369, 404
Smith v. Nelson 247
Smith v. Pond 262, 264, 271
Smith v. Smith 263, 398
Smith v. State 548
Smith Charities v. Northhampton 84, 105
Smith's Estate 130, 131, 134, 157, 191
Smithsonian Institution v. St. John 36, 230, 231, 356, 357
Snowden v. Crown Cork and Seal Co 27, 226, 233, 250
Society of the Cincinnati Appeal 274
Society of Helpers of Holy Souls v. Law 249
Society of Most Precious Blood v. Moll 221
Society for the Promotion of Learning v. New Brunswick 509
Society for Promoting Theological Education v. Attorney General 91
Society for Propagation of the Gospel v. New Haven 329
Society for Relief of Destitute Orphan Boys v. New Orleans 52, 54
Soldiers Orphan Home v. Wolf 327, 437
Soohan v. Philadelphia 187, 338
Soule, Attorney General v. 265, 284, 421
Southhampton Hospital Ass'n v. Fordham 381
South Newmarket Methodist Seminary v. Peasley 328, 406, 408, 416
Southworth, In re 275
Sowers v. Cyrenius 261, 279, 320, 391
Spalding v. St. Joseph's Industrial Schools 76, 80, 125, 282
Spangler, In re 526, 531
Speed, In re 527, 528
Speer v. Colbert 244, 306, 315
Spence, In re 36
Spence v. Widney 152, 202, 205, 316, 374
Spencer v. De Witt C. Hay Library Ass'n 36
Spring Green Church v. Thornton 316
Sprowl v. Blankenbaker 172, 236
Stahl v. Kansas Educational Ass'n 488
Staines v. Burton 63, 165, 272, 273, 304, 374
Stallman's Appeal 242
Stanley v. Colt 110, 116, 117, 162, 277
Stanley v. Schumpert 539
Starkweather v. American Bible Society 110, 453

(References are to pages)

Starr v. Selleck....36, 155
Starr v. Morningside College.... 99
State v. Academy of Science....140, 199
State v. Adams.... 419
State v. Addison.... 144
State v. Allen.... 517
State v. Ausmus....316, 324, 331
State v. Bank of Commerce and Trust Co....378, 424
State v. Board of Assessors....460, 463, 473, 488, 509, 512, 522
State v. Brawner.... 143
State v. Carleton College....465, 483, 494, 497, 500, 501
State v. Casey.... 520
State v. Central St. Louis Masonic Hall Ass'n.... 522
State v. Chatham.... 497
State v. Elizabeth.... 511
State v. Elliston.... 331
State v. Fisk University....466, 478, 497
State v. Fleming.... 427
State v. Gerard....49, 297, 319, 367
State v. Griffith....7, 10, 11, 236, 237, 277, 293, 313, 342, 363, 376
State v. Johnston....484, 491
State v. Lakewood Cemetery Ass'n....486, 518, 519
State v. Lange....502, 519
State v. Leester.... 511
State v. McDonogh....3, 54, 82, 120, 139, 214, 237, 333, 445, 447
State v. McGowen....49, 297
State v. Maggurn.... 507
State v. Parish of Orleans....463, 491, 497
State v. Powers....138, 480, 481
State v. Ross....493, 501, 509
State v. St. Barnabas Hospital.... 498
State v. Scott.... 463
State v. Settegast.... 474
State v. Smith.... 425
State v. Stewart.... 5
State v. Tabitha Home.... 426
State v. Toledo....67, 135, 214, 299, 375
State v. Vanderbilt University.... 419
State v. Walter.... 162
State v. Warren....26, 221, 246
State v. Watkins.... 512
State v. Wilson.... 513
State v. Wiltbank.... 345
State Bank and Trust Co. v. Patridge....50, 80, 295, 341
State ex rel. Heddens v. Rusk....104, 426
Staunton v. Mary Baldwin Seminary....508
Stearns v. Newport Hospital....110, 264, 276, 402, 430
Stephenson v. Short....350, 351, 352
Steven's Appeal....187, 441
Steven's Estate....57, 187, 441
Stevens Institute v. Bower.... 496
Stevens Institute v. Hoboken....495, 496
Stevens v. Shippon....156, 201
Stewart's Estate, In re....63, 138, 203, 236, 304, 451
Stewart, State v.... 5
Stewart v. Coshow....149, 218, 369, 373
Stewart v. Davis....500, 501
Stewart v. Franchetti....291, 437

(References are to pages)

Stickney, In re 349
Stillwell, People v 485
Stimson Memorial Library v. Union County 513
Stoepel v. Satterthwaite 39, 222
Stone v. Griffin 250
Stonestreet v. Doyle 234
Storr's Agricultural School v. Whitney 152, 171, 365, 366
Storsy v. Knapp 153
Stoughton v. Hartford 496, 497
Stratton v. Physio-Medical College 202, 396
Straw v. East Maine Conference of M. E. Church 172, 416
Strong, In re 134, 137, 212, 261, 297
Strother v. Barrow 129, 140, 163, 166, 374, 391
Stuart, In re 406
Stuart v. Easton 135, 138, 218, 438
Sturgis, In re 323
Sturm v. Stump 457
Su Lee v. Peck 160
Summers v. Daviess County 537, 538
Summonduwot Lodge v. Spaeth 488
Supreme Lodge v. Effingham County 523
Susman v. Y. M. C. A 539
Suter v. Hilliard 271
Sutter v. Milwaukee Board of Fire Underwriters 141, 195, 539
Sutro, In re 30, 137, 265
Swasey v. American Bible Society 169, 205, 233, 294, 295, 299, 301, 319, 369
Sweeney v. Sampson 207, 290
Swift v. Beneficial Society of Easton 144
Taber v. St. Peter's Parish 405
Tabitha Home, State v 426
Tactkian, In re 266
Tainter v. Clark 206, 438
Tappan, Appeal of 233, 261, 267, 292, 295, 379
Tappan v. Deblois 4, 18, 66, 191, 406
Tate v. Woodyard 110, 144, 165, 323, 373, 418
Tavshanjian v. Abbott 195, 231
Taxation, Appeal from 470, 508
Taylor Orphan Asylum, In re 114, 328, 419
Taylor v. Bryn Mawr College 203, 232, 410, 452
Taylor v. Columbian University 100, 149, 204, 205, 438
Taylor v. Flower Deaconess Home and Hospital 546
Taylor v. Hoag 149, 209
Taylor v. Keep 78, 121, 122, 264, 265, 266, 267, 271, 303, 395, 396
Taylor v. Protestant Hospital Ass'n 156, 548
Tax Commissioners, People v 209
Teed, In re 227
Teele v. Bishop of Derry 95, 96, 97, 101, 165, 447, 448
Telle v. Roever 150
Temple Grove Seminary v. Cramer 485
Texas and Pacific Co. v. Connaughten 554
Texas Cent. R. Co. v. Zumwalt 555
Tharp v. Fleming 116
Tharp v. Smith 42, 79
Thayer Academy v. Braintree 493
Theological Seminary v. Childs 41
Theological Seminary of Auburn v. Kellogg 225, 227, 347, 349
Thiel College v. Mercer County 478, 479
Thomas v. Ellmaker 55, 194, 332

(References are to pages)

Thomas v. German General Benevolent Society..... 551
Thompson, Succession of..... 445
Thompson v. Brown.....73, 290
Thompson v. Congregational Society..... 169
Thompson v. Hale.....152, 316, 321
Thompson v. Norris.....126, 271
Thompson v. Swoope.....169, 349, 447, 453, 455
Thornton v. Franklin Square House.....157, 295, 547
Thorp v. Lund.....
....122, 129, 133, 135, 137, 141, 212, 219, 268, 270, 273, 387, 447
Thurston County v. Sisters of Charity..... 461
Tichenor v. Brewer.....292, 414
Ticknor, In re.....250, 252
Tilden v. Green.....3, 4, 79, 138, 231, 267, 283, 285
Tilton, Succession of..... 139
Tincher v. Arnold....78, 81, 89, 133, 237, 261, 296, 310, 374, 375, 432
Tirney's Estate 180, 370
Tobin, In re..... 186
Todd v. St. Mary's Church.....164, 243, 369
Toledo, State v.....67, 135, 214, 299, 375
Toner's Estate 92, 424
Torrey v. Day..... 285
Totawa v. State Board..... 520
Towle v. Nesmith..... 294
Trafton v. Black..... 266
Travelers' Insurance Co. v. Kent.....465, 506
Treadwell v. Beebe.....297, 298, 333
Treat, Appeal of.....305, 310, 374
Trenton Society v. Howell.....261, 314, 389
Tri State Fair v. Rowton..... 539
Trim v. Brightman.....81, 297, 411
Trinity Church, Attorney General v.....135, 169, 428
Trinity Church v. Boston..... 505
Trinity Church v. New York..... 519
Trinity M. E. Church South v. Baker.....
.....226, 227, 228, 262, 263, 381, 414
Trippe v. Frazier.....26, 221
Troutman v. Boissiere Odd Fellows Orphan Home.....
.....63, 108, 129, 137, 138, 140, 152, 236, 293, 373, 391
Trustees v. Guthrie.....7, 21, 22, 24, 163, 172, 448
Trustees of Presbyterian Church v. Katsianis..... 98
Tucker v. Mobile Infirmary Ass'n.....548, 549
Tucker v. St. Clement's Church.....167, 228
Tucker v. Seaman's Aid Society.....248, 410
Tunstall v. Wormley..... 162
Tuttle, Petition of.....219, 371, 372
Tyree v. Bingham.....187, 421
Tyssen on Charitable Bequests..... 193
Underhill, In re..... 526
Underhill v. Wood.....249
Union Baptist Association v. Hunn.....418, 420
Union Baptist Society v. Canthia.....64, 65, 337
Union M. E. Church v. Wilkinson..... 292
Union Pacific R. Co. v. Artist.....131, 138, 189, 546, 555
Union Society of Worcester, Attorney General v.....174, 260
Union Trust and Savings Bank v. Ishkanian..... 240
United Brethren Publishing Establishment v. Shaffer..... 489
United States Trust Co, In re..... 107

(References are to pages)

United States v. Church of Jesus Christ of Latter Day Saints....
.....63, 77, 92, 102, 103, 125, 153, 165, 168, 322, 400
United States v. Fox..... 219
United States v. Mormon Church..... 117
United States Trust Co. v. Wood..... 449
Universalist Convention v. May.....80, 96
University of Chicago v. People..... 458
University of Georgia v. Denmark..... 358
University of Louisville v. Hammock.....539, 544
University v. People..... 468
University v. Tucker.....414, 448
Unruh's Estate..... 94
Upham, In re.....73, 186, 312, 374, 393
Urmay v. Wooden.....67, 126, 297, 310, 393
Utica Trust and Deposit Co. v. Thompson.....33, 34, 37, 235, 267, 283
Vance, Succession of.....91, 445
Vander Volgen v. Yates..... 145
Vanderbilt, In re..... 526
Vanderbilt University, State v..... 419
Vanderbilt University v. Cheney..... 508
Vanderveer v. McKane..... 180
Van Horne, In re..... 111
Van Hoven v. Immanuel Presbyterian Church.....425, 430
Van Ingen v. Jewish Hospital of Brooklyn..... 557
Vansant v. Roberts..... 453
Van Syckel v. Johnson.....169, 370, 380
Van Tassel v. Manhattan Eye and Ear Hospital..... 547
Vassar, In re.....529, 531
Venable v. Coffman.....77, 162
Vermillion v. Woman's College of Due West.....202, 544
Vermont Baptist State Convention v. Ladd..... 414
Vicksburg v. Vicksburg Sanitarium..... 479
Vidal v. Girard.....
.....1, 6, 10, 12, 17, 31, 55, 68, 129, 158, 187, 217, 246, 288, 312
Villa, Succession of.....52, 161, 165, 389, 445
Vineland Historical and Antiquarian Society, In re.....531, 532
Vineland Trust Company v. Westendorf.....209, 305
Vink v. Work..... 514
Vogt v. Louisville.....137, 516
Volunteers of America v. Peirce.....100, 193, 252, 255, 398
Voorhees v. Presbyterian Church of Amsterdam..... 30
Voorhees v. Voorhees..... 448
Wachovia Banking and Trust Co. v. Ogburn....80, 121, 149, 205, 235
Wade v. American Colonization Society..... 45
Wagner Free Institute's Appeal..... 501
Wait v. Society for Political Study..... 36
Walden, In re..... 393
Waldron, In re..... 370
Walker v. Walker.....192, 312
Wall v. Mines..... 429
Wallace, Attorney General v..50, 111, 172, 275, 276, 305, 427, 429, 431
Wallwork v. Nashville.....538, 548
Walter, State v..... 162
Wambersie v. Orange Humane Society..... 336
Warburton Ave. Baptist Church v. Clark.....35, 229
Ward v. St. Vincent's Hospital..... 540
Ward Seminary v. Nashville.....474, 489, 503
Ware v. Fitchburg.....117, 189

(References are to pages)

Warren, State v. 26, 221, 246
Washburn v. Acome 249, 381
Washburn v. Sewell 251
Washburn College v. O'Hara 63, 143, 162, 171, 199
Washburn College v. Shawnee County 503
Washington and Lee University, Appeal of 406
Washington Camp v. Board of Equalization 141, 485, 510
Washington County Hospital Ass'n v. Mealey 523
Washington Heights M. E. Church v. New York 504
Washington Loan and Trust Co. v. Hammond 28, 187, 313
Wathen v. Louisville 480
Watkins, State v 512
Watkins v. Bigelow 43, 44, 231
Watson v. Boston 512
Watson, Henry, Children's Aid Society v. Johnson 222
Watson v. Cowles 490
Watt's Estate 353
Waycross v. Waycross Savings and Trust Co 510
Weaver v. Spurr 234
Webb Academy v. Grand Rapids 486, 493, 496
Webb v. Neal 217, 297
Webber Hospital Ass'n v. McKenzie 94, 139, 154, 188, 189, 319, 331
Weber v. Bryant 272
Webster v. Morris 40, 79, 100, 205, 227, 283, 290, 301, 302, 406, 414
Webster v. Sughrow 65, 138, 178, 370
Webster v. Wiggin 100, 126, 128, 140, 192, 203, 214, 229, 325, 362, 364, 366, 370, 374, 376
Webster City v. Wright County 500
Weddle v. Frederick County 538
Weekes, In re 213, 450
Weeks v. Hobson 111
Welch, In re 303
Welch v. Caldwell 61, 104, 137, 221, 245, 303, 304, 317, 320
Wells v. Doane 304
Wells v. Ferry Baker Lumber Co 555
Wells v. Heath 169
Weme v. First Church of Christ Scientist 115, 187, 224, 310, 314, 419
Werner, In re 286
Wesleyan Academy v. Wilbraham 497
West v. St. James Episcopal Church 432
Western Seamen's Friend Society, People v 460, 530
Weston v. Amesbury 337
Weston v. Hospital of St. Vincent of Paul 547, 553
Wetmore v. New York Institution for Blind 285, 407
Wetmore v. Parker 226, 341, 346, 347, 365, 377
Wey v. Salt Lake City 458, 472
Wharton v. Warner 188, 547
Wheeler v. Smith 21, 68, 395
Wheelock v. American Tract Society 281, 284, 399
White, In re 533
White v. Alabama Insane Hospital 538
White v. Attorney General 167, 241
White v. Ditson 127, 277, 325
White v. Fisk 74, 80, 284
White v. Hale 121, 312, 375, 388
White v. Howard 7, 47, 240, 247, 249, 347, 348, 356, 449, 453, 454, 455
White v. Keller 375, 437
White v. Newark 191, 310

(References are to pages)

White v. Smith....459, 472, 493
White v. South Parish in Braintree.... 334
White Lick Quarterly Meeting v. White Lick Quarterly Meeting.. 185
White School House v. Post....316, 427, 428
Whitman v. Lex.... 365
Whitman College v. Berryman....469, 513
Whitmore v. Church of the Holy Cross.... 442
Whittaker v. St. Luke's Hospital....544, 553
Widows' and Orphans' Home v. Commonwealth....287, 293, 463, 523
Wilce v. Van Anden.... 300
Wilcox v. Attorney General.... 262
Wilderman v. Baltimore....222, 254
Willamette University v. Knight....474, 476
Willard v. Pike....156, 473, 483, 486, 495, 504
Willett v. Willett.... 194
Willey, In re....144, 145, 237, 326, 370
Williams, Appeal of....206, 263, 389
Williams College v. Williamstown.... 494
Williams v. First Presbyterian Society....165, 420
Williams v. Pearson....4, 7, 10, 80, 235, 296, 298, 310
Williams v. Western Star Masonic Lodge....53, 139
Williams v. Williams....
....4, 9, 18, 19, 30, 75, 225, 239, 285, 290, 363, 365, 373
Williamson v. Louisville Industrial School....194, 538, 544
Williamson v. New Jersey.... 470
Williston Seminary v. Hampshire County.... 512
Wilmes v. Tierney.... 178
Wilmington Conference M. E. Church v. Williams.... 414
Wilson, State v.... 513
Wilson, In re....219, 288, 409
Wilson v. Brooklyn Homeopathic Hospital....540, 547
Wilson v. First National Bank....
....102, 120, 122, 138, 201, 206, 288, 373, 393
Wilson v. Licking Aerie.... 521
Wilson v. Lynt....73, 96, 363, 373
Wilson v. Perry....25, 225, 234, 414
Wiltbank, State v.... 345
Winchester, In re....208, 251, 254
Winnemore v. Philadelphia....539, 541
Winslow v. Cummings....98, 118
Winslow v. Stark....99, 275, 313, 369
Winthrop v. Attorney General.... 105
Witman v. Lex....11, 55, 165, 171, 249, 292, 303, 328
Wolfe, In re.... 532
Woman's Christian Ass'n v. Kansas City....
....90, 93 99, 105, 106, 112, 429, 544
Woman's Foreign Missionary Society v. Mitchell....227, 392, 406
Woman's Home Missionary Society, People v.... 530
Woman's Hospital League v. Paducah.... 425
Woman's Seamen's Friend Society v. Boston Y. W. C. A....394, 443
Woman's Union Missionary Society v. Mead....406, 411
Wood v. Fourth Baptist Church....165, 247, 311
Wood v. Hammond....348, 415
Wood v. Paine....68, 248
Woodlawn Cemetery v. Everett.... 518
Woodruff v. Hundley....80, 171, 279, 366, 372
Woodruff v. Marsh....80, 261, 290, 296, 377, 383, 400, 443
Woods, In re.... 227

(References are to pages)

Woods v. Bell 314
Worcester v. Eaton 216
Worcester City Missionary Society v. Memorial Church 281
World's Columbian Exposition v. United States 141
Wright, In re 345
Wright v. Linn 11, 143, 203
Wright v. M. E. Church 229, 247
Wright v. O'Brian 285, 431
Wright v. Wright 98, 378
Wyman v. St. Louis 466, 509
Yale College, In re 212, 218, 313
Yale University v. New Haven 457, 466, 483, 493, 494, 506
Yard, Appeal of 324, 330, 374, 413
Yates v. Yates 10, 11, 12, 30, 362, 381
Yingling v. Miller 26, 228
Young v. Davis 101
Young v. St. Mark's Lutheran Church 171, 306, 385
Y. M. C. A., People v 510
Y. M. C. A., In re 576
Y. M. C. A. Assessment, In re 155, 463, 510, 515
Y. M. C. A. v. Donahugh 510, 515
Y. M. C. A. v. Douglas County 476, 510
Y. M. C. A. v. Estill 153, 156
Y. M. C. A. v. Horn 44
Y. M. C. A. v. New York 516
Y. M. C. A. v. Peterson 516
Young Men's Protestant Temperance Society v. Fall River 523
Y. W. C. A. v. Monmouth County 505
Y. W. C. A. v. Spencer 504
Zable v. Louisville Baptist Orphans' Home 458
Zanesville Canal and Mfg. Co. v. Zanesville 201, 339, 393
Zeisweiss v. James 159, 303
Zimmerman, In re 179
Zimmerman v. Anders 55, 247
Zion Church v. Parker 161
Zoulalian v. New England Sanitarium 157, 558
Zumwalt v. Texas Central R. Co 554

CHAPTER I

STATUTE OF ELIZABETH

§ 1. **Heathenism devoid of Charity.** The law of charitable uses is unknown to the jurisprudence of purely pagan peoples. Tribal savage customs, according to which members were put to death as soon as they had ceased to be useful, entirely aside, no trace of charity can be found in the code of Hamurabi or in the twelve tables of the early Roman law. The Spartan code of Lycurgus, which decreed the death of children deemed to be too weak to be useful to the State, is well known and is positive evidence of the complete lack of charity which characterizes the heathen world. Only with the rise of Christianity to power in the Roman empire, was the law of charitable uses engrafted on the Roman jurisprudence having its origin in "the great command to love thy neighbor as thyself."[1] It is one of the earliest and finest flowers of Christianity, and occupied the Roman rulers during most of the period of the Empire. Through the Roman law it has spread to every people which has adopted that system of jurisprudence, has taken its place in the common law, and is to-day universally recognized as an essential part of every civilized code.

§ 2. **Jewish Law of Charity.** Charity, however, was not unknown before the time of Christ. The Jewish people, many centuries before that time, had a legally defined plan for charitable relief. This system can be gathered from the code of Moses. Says that ancient lawgiver: "When ye reap the harvest of your land, thou shalt not make clean riddance of the corners of thy field when thou reapest, neither shalt thou gather any gleanings of thy harvest; thou shalt leave them unto the poor, and to the stranger."[2] The same command is again laid down in more

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[1] 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 498, 16 Ld. Ed. 701.

[2] Leviticus, chapter 23, verse 22. See chapter 19, verses 9 and 10. For a case of a literal compliance with this law, see Ruth, chapter 2, verses 15 and 16. See also Horace Binney's discussion 1844, Vidal v. Girard, 43 U. S. (2 How.), 127, 149; 11 L. Ed. 205; 1854, Fontain v. Ravenel, 58 U. S. (17 How.), 369, 384, 15 L. Ed. 80. Says the Missouri court: "Although it was not known which individual would get the sheaf,

detail as follows: "When thou cuttest down thine harvest in thy field, and hast forgot a sheaf in the field, thou shalt not go again to fetch it: it shall be for the stranger, for the fatherless, and for the widow. * * * When thou beatest thine olive tree, thou shalt not go over the boughs again: it shall be for the stranger, for the fatherless, and for the widow. When thou gatherest the grapes of thy vineyard, thou shalt not glean it afterward: it shall be for the stranger, for the fatherless, and for the widow."[3] In line with this policy is the prohibition against afflicting "any widow or fatherless child,"[4] against taking a widow's raiment to pledge,[5] against taking a poor man's garment to pledge longer than sundown,[6] and against refusing to lend to the poor when the year of release was close at hand.[7]

§ 3. **Jewish Law of Charity. Consequences.** It was but natural that this charity should be largely confined to Jews. While usury as against a stranger was expressly permitted, usury from a brother was, therefore, expressly forbidden.[8] It is this law of charity, and the customs of mutual helpfulness and hospitality that have grown out of it, that has knit the Jews together through all the numberless dispersions and persecutions which they have undergone, and has enabled them to preserve a distinct racial and religious identity. The policy of extending aid and comfort to the poor and unfortunate has thus proved to be far superior to all the reasoned cruelty of a Lycurgus, or to the customs of expediency of savage tribes.

§ 4. **Charity a Product of Christianity.** But while this law has been instrumental in keeping the Jewish people together, the Jews as such did not engraft their system on the jurisprudence of other peoples. Being a persecuted race, they on the one hand lacked the necessary influence, and on

yet it was known that a class of poor gleaners would come after the harvesters had passed." 1907, Hadley v. Forsee, 203 Mo., 418, 427, 101 S. W. 59.

[3] Deuteronomy, chapter 24, verses 19, 20, 21.

[4] Exodus, chapter 22, verse 22.

[5] Deuteronomy, chapter 24, verse 17.

[6] Deuteronomy, chapter 24, verse 13. See Exodus, chapter 22, verses 26 and 27. Job, chapter 22, verse 6.

[7] Deuteronomy, chapter 15, verses 7-9.

[8] Deuteronomy, chapter 23, verse 19, 20. See Nehemiah, chapter 5, verse 7; Psalms, chapter 15, verse 5; Ezikiah, chapter 18, verse 8.

the other were fully occupied with relieving their own mutual wants. It has, therefore, been the influence of the Christian religion which has engrafted this law on the jurisprudence of the world. Charity in thought, speech and deed has challenged the admiration and affection of mankind, and has effectually been taught by Christianity as its crowning grace and glory.[9] The dicta of eminent judges and textwriters, which trace the origin of the law of charity to the influence of the Christian religion, are, therefore, correct and unimpeachable.[10]

§ 5. **English Charity Law. Connection with Roman Law.** This chapter, however, is not concerned with the origin of the law of charities in general, but rather with its origin in the English system of jurisprudence. It is but natural to assume that it was introduced in England together with the Christian religion. Since the common law never prevailed where the Christian religion did not exist, it is but natural to find that law a patron of charities.[11] One of the earliest demands of every social community upon its lawgivers, at the dawn of its civilization, "is adequate protection of its property and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture."[12] No less an authority than Lord Coke, in a case arising before the statute of Elizabeth, has, therefore, said that "no time was so barbarous as to abolish learning and

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[9] 1882, Beckwith v. St. Philip's Parish, 69 Ga. 564, 570. It is respectfully submitted that a solution of the gordian knot presented by the Europe of to-day can be found only by and through Christian charity in its largest sense. What rough force and smooth diplomacy have failed to accomplish is not beyond the power of charity. Charity, not only in its legal or popular, but in its religious sense, charity by the victors toward the vanquished, by the vanquished toward the victors, and by both victors and vanquished toward each other will solve racial and economic problems which have completely baffled trained generals and experienced statesmen. If the terrible wounds inflicted on Europe by the war are to be healed with the minimum amount of festering, it is charity, not military force or diplomatic persuasion which must supply the wine and oil. National hatred can only lead to war, bloodshed and desolation. It is national charity which forgets hate, which must point the path to peace.

[10] 1853, State v. McDonogh, 8 La. Ann. 171, 246.

[11] 1860, Chambers v. St. Louis, 29 Mo. 543, 583.

[12] 1839, McIntyre Poor School v. Zanesville Canal and Mfg. Co., 9 Ohio 203, 287, 34 Am. Dec. 436. Approved 1888, Mannix v. Purcell, 46 Ohio St. 102, 142, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

knowledge, nor so uncharitable as to prohibit relieving the poor."[13] It has, therefore, been correctly stated that the law of charity was, at an indefinite but early period of English judicial history, engrafted upon the common law, and derived its general maxims from the civil law, as modified in the later periods of the Roman Empire by the ecclesiastical elements introduced with Christianity.[14] It was not founded on any statute, but existed independently of any written law, and is evidenced by both cases decided and statutes passed before the time of Elizabeth.[15] It has, therefore, been said that charitable trusts "were engrafted into the Roman law concurrently with the growth of Christianity; and with the same benign influence, they became a part of the common law of England. They were recognized and in force before the Norman conquest."[16]

§ 6. **Importance of Statute of Elizabeth in England and America.** There can be no question but that charitable institutions were in full operation in England during the middle ages. The various mortmain statutes, passed from time to time, show conclusively that such was the case. Despite this fact, the entire charity doctrine has in England, by a refined and recondite construction of the preamble of the statute of Elizabeth in the course of a long series of decisions, been evolved from the statute, thus obscuring the very historical facts which led to its enactment. The question of the origin of the law of charities is, therefore, now a purely academic one in England, and is of no consequence in the decision of a lawsuit.[17] A different situation exists in America where the statute in a majority of the states has not been adopted or reënacted, and where it has in a number of them been repealed with other English statutes. It follows that the question here is not a merely speculative one, but is one

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[13] Porter's Case 1 Coke 24a, cited 1872, Birchard v. Scott, 39 Conn. 63, 69.

[14] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 542; 1862, Williams v. Pearson, 38 Ala. 299, 304, 305; 1848, Beall v. Fox, 4 Ga. 404, 426; 1867, Heuser v. Harris, 42 Ill. 425, 430; 1909, Klumpert v. Vrieland, 142 Iowa 434, 437, 121 N. W. 34; 1866, Bascom v. Albertson, 34 N. Y. 584, 601. But see 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 179, 180, 218.

[15] 1835, Burr v. Smith, 7 Vt. 241, 291, 29 Am. Dec. 154.

[16] 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 51. (N. Y.)

[17] 1858, Tappan v. Deblois, 45 Me. 122, 130; 1860, Chambers v. St. Louis, 29 Mo. 543, 585. See 1835, Burr v. Smith, 7 Vt. 241, 292, 29 Am. Dec. 154.

of strict legal inquiry. This inquiry has accordingly been made by both state and federal courts. Since it was begun at a time when it was still "the universal opinion in England and this country, among lawyers and jurists, that all charitable trusts depended for their validity, and had their origin in the statute of Elizabeth,"[18] it is not surprising that it has resulted in "the utmost conflict of judicial utterances in the earlier cases."[19]

§ 7. **Early Supreme Court Decision and its Consequences.** Since the subject is of such tremendous importance, it has at an early date been carried to the United States Supreme Court. This court accordingly has played a most important part—unfortunately on both sides of the controversy. In a case arising in Virginia where all English statutes had been repealed, and coming before the court in 1819, it was held that the doctrine of charitable trusts originated with the statute of Elizabeth and that the repeal of the statute eliminated it from the Virginia law.[20] This decision received added importance by the fact that the opinion was written by the venerable Chief Justice Marshall, and was concurred in by the entire court, including Justice Story, who wrote a concurring opinion. There probably would have been no difficulty in this country but for this decision.[1] It has fixed to this day the doctrine in vogue in Virginia, West Virginia, and Maryland, has been of some influence on the development in New York, Michigan, Wisconsin, and Minnesota,[2] and has caused courts of other states to hesitate or temporarily to proceed in the wrong direction.[3]

§ 8. **Investigations following such Decision.** The case did not long remain unchallenged. Undaunted by it, judges of other courts and attorneys of national fame collaborated to clear up the situation. A leading place in this matter must be assigned to Judge Baldwin of the United States Circuit

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[18] 1865, Levy v. Levy, 33 N. Y. 97, 109.

[19] 1891, Pennoyer v. Wadhams, 20 Or. 274, 279, 25 Pac. 720, 11 L. R. A. 210.

[20] 1819, Philadelphia Baptist Ass'n v. Hart, 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499.

[1] 1874, Ould v. Washington Hospital, 1 MacArthur 541, 550, 29 Am. Rep. 605 (affirmed 95 U. S. 303, 24 L. Ed. 450).

[2] See Chapter 2, Sections 35 to 68.

[3] See list of cases enumerated in 1908, In re Nilson, 81 Neb. 809, 821, 116 N. W. 971. See also 1872, Newson v. Starke, 46 Ga. 88, 91; 1881, State v. Stewart 11 Del. (6 Houst.) 359, 371.

Court of the Eastern District of Pennsylvania. In a case coming before him in 1833, he made a most extensive search of the law, reached the conclusion that charities are not dependent on the statute of Elizabeth, and laid down the result of his investigation in an opinion of great length and deep learning,[4] which "led the way upon this question of jurisdiction in the United States."[5] Following this decision, the contention of the United States Supreme Court was vigorously assailed by eminent New York counsel in **Burr v. Smith,**[6] a case arising in Vermont and decided in 1835, and was now ready to be abandoned by the very court which had propounded it. Nor were the researches confined to America. A record commission had been appointed in England, had delved into the "unreported jurisprudence of the middle ages,"[7] and had published a report which showed conclusively that charities were recognized by English courts long before the statute of Elizabeth. Such report could not but be instrumental in bringing about a change in the views of the United States Supreme Court.[8]

§ 9. **Girard Will Case. Reversal of Early Decision.** In 1844 the famous Girard will case reached the court.[9] Stephen Girard, a wealthy merchant of Philadelphia, had left the bulk of his million dollar fortune for the establishment of an orphan asylum in the city of brotherly love. The will was vigorously assailed, no less a person than Daniel Webster appearing for the heirs, while Horace Binney, the sage of the Philadelphia bar, represented the executors. The argument of Binney in this case has been termed a "marvel of forensic skill"[10] sustained throughout "not only by an almost measureless wealth of research, but crowned with unanswerable logic,"[11] and overwhelmed the ponderous argument advanced by Webster, resulting in the establishment of the charity

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[4] 1833, Magill v. Brown, Fed. Cas. No. 8952; Brightly N. P. 346; 14 Haz. Reg. Pa. 305.

[5] 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 502, 16 L. Ed. 701.

[6] 7 Vt. 241, 29 Am. Dec. 154.

[7] 1865, Levy v. Levy, 33 N. Y. 97, 107.

[8] 1857, McCaughal v. Ryan, 27 Barb. 376, 391 (N. Y.). For a list of the cases contained in this report see 43 U. S. 155-160 note.

[9] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 11 L. Ed. 205.

[10] 1908, In Re Nilson, 81 Neb. 809, 821, 116 N. W. 971.

[11] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 768.

which is in active operation to-day. More than this, however, was accomplished, for the former decision of the court was now thoroughly "exploded"[12] so far at least as it decided that the jurisdiction of equity over charities depends on the statute of Elizabeth,[13] and the doctrine so important in the United States that equity has inherent jurisdiction over charities independent of the statute, and that the mere fact that the common law has been aided by it is no reason why such common law itself should not be in force,[14] had now received the sanction of the highest court of the land. The case is of the utmost importance, since it has reëntrenched the English charity doctrine in the American law. It is not an arbitrary decision, but is based on hard facts and held together by unanswerable logic. An impartial mind, after a careful study of it, will not only be convinced of the fallaciousness of the earlier case, but forced to recognize the deep philosophy through which it was overturned and repudiated.[15] In consequence, the great current of American authorities set in strongly in favor of the doctrine that, independently of the statute of Elizabeth, and of the prerogative power, "there is an original and inherent jurisdiction in those courts to sustain, on account of their charitable purposes, trusts which, but for the charitable feature, would be held void."[16]

§ 10. **Early Controversies Summarized.** It has been seen that the question "whether equity has inherent power

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[12] 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 467, 8 S. W. 346; 1877, Ould v. Washington Hospital, 95 U. S. 303, 309, 24 L. Ed. 450 (affirming 1 MacArthur 541, 29 Am. Rep. 605).

[13] 1877, Kain v. Gibbony, 101 U. S. 362, 366, 25 L. Ed. 813 (affirming Fed. Cas. No. 7597, 3 Hughes 397).

[14] 1860, Chambers v. St. Louis, 29 Mo. 543, 586.

[15] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 768.

[16] 1862, Williams v. Pearson, 38 Ala. 299, 305; 1885, Johnson v. Holifield, 79 Ala. 423, 425, 58 Am. Rep. 596; 1871, White v. Howard, 38 Conn. 342, 362; 1847, State v. Griffith, 2 Del. Ch. 392; 1848, Beall v. Fox, 4 Ga. 404, 427; 1872, Newson v. Starke, 46 Ga. 88, 96; 1846, McCord v. Oichitree, 8 Blackf. 15, 20 (Ind.); 1876, Lagrange County v. Rogers, 55 Ind. 297, 300; 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 803, 84 N. W. 273, 83 Am. St. Rep. 553; 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 133, 9 Am. Dec. 619; 1839, McIntire Poor School v. Zanesville Canal and Mfg. Co., 9 Ohio 203, 287, 34 Am. Dec. 436; 1888, Mannix v. Purcell, 46 Ohio St. 102, 140, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753. See 1889, Trustees v. Guthrie, 86 Va. 125, 149, 10 S. E. 318, 6 L. R. A. 321; 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 501, 16 L. Ed. 701. See also a note in 14 L. R. A. (N. S.) 55.

over charitable trusts'' is a very important one in America. In consequence it has been accorded an investigation by the various courts such as few subjects have received. There were two early controversies: 1. Did charitable trusts originate with the statute of Elizabeth? 2. Is the English system adapted to our situation and was it adopted?[17] The second of these controversies will be taken up first.

§ 11. **Difficulties in adapting the English Law to America.** The attempt to adapt to our social relations a system of charity law which had been developed and matured by usage, legislation and judicial construction, in a country more or less different in the origin and form of its government, the habits and customs of its people, and in its religion and property tenures, has involved the courts in much difficulty and perplexity.[18] This is due to the fact that the jurisdiction of the English courts over charities rests on the following three distinct foundations: 1. Their ordinary jurisdiction over trusts. 2. The prerogative of the crown. 3. The statute of Elizabeth.[19] It has, therefore, been said that the English system proceeds ''in disregard of rules deemed elementary and fundamental in other limitations of property, in upholding indefinite charitable gifts by the exercise of chancery powers and the royal prerogative. It is not the exercise of the ordinary jurisdiction of chancery over trusts, but a jurisdiction extended and strengthened by the prerogative of the crown and the Statute of 43d Elizabeth.''[20] This system is, without doubt, more comprehensive than any American system can possibly be. Yet, its three branches exist not as separate or separable elements, but rather as inseparable conglomerates. American courts have, therefore, been confronted with the task of determining how much of the blended mass is adapted to the American situation and must be careful not to transcend the limits of judicial authority.[1] They must, in all cases, eliminate the royal prerogative, and in many the statute of Elizabeth, and retain

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[17] 1900, Harrington v. Pier, 105 Wis. 485, 515, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[18] 1844, Green v. Allen, 24 Tenn. (5 Humph) 170, 178.

[19] 1856, Owens v. Missionary Society, 14 N. Y. (4 Kern) 380, 387, 67 Am. Dec. 160.

[20] 1865, Levy v. Levy, 33 N. Y. 97, 105.

[1] 1861, Beekman v. Bonsor, 23 N. Y. 298, 307, 80 Am. Dec. 269 (affirming 27 Barb. 260).

only what is left. Were it possible to analyze, at this day, the jurisdiction of the English courts independently of that resting on the prerogative of the crown and the statute of Elizabeth, all doubts could be quickly solved. However, the blending of these various powers and their consequent indiscriminate exercise has rendered this a difficult, if not impossible, task.[2] In reference to English decisions, it is, therefore, necessary to determine, as nearly as possible, whether they resulted from the ordinary exercise of chancery powers, or from the prerogative of the crown, or are directly deducible from the terms of the statute of Elizabeth.[3]

§ 12. **Essentials of English Doctrine in Force in America.** While the question of the quantum of English law in force in America is very involved, it is undoubted that the doctrine itself, stripped of its English redundancies, is applicable to American conditions. "There is nothing in the situation or circumstances of this country, or in our form of government, which renders the general principles of the law of charity, as understood in England, inapplicable to us. The duty of providing for the poor and necessitous, in respect to their physical wants, as well as in regard to their religious, moral and intellectual well-being, does not depend upon the form of government, but is equally binding, whether the people are governed by representative institutions, or by hereditary rulers. Nor does the consideration that a religious establishment is forbidden, and that all preferences among religious denominations are prohibited, require the abolition of the law of charity."[4]

§ 13. **Difficulties of determining whether English Law rests on Statute of Elizabeth.** Even eliminating the royal prerogative as a creative factor, the question remains whether or not the English doctrine rests on the statute of Elizabeth or exists independently of it. This question, on account of the age of the statute, on account of the fact that English equity jurisprudence was in its infancy at the time of its passage, and because the art of reporting was then very imperfectly developed, presents an inquiry which is extremely

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[2] 1856, Owens v. Missionary Society, 14 N. Y. (4 Kern) 380, 387, 67 Am. Dec. 160.

[3] 1854, Fontain v. Ravenel, 58 U. S. (17 How.) 369, 384, 15 L. Ed. 80.

[4] 1853, Williams v. Williams, 8 N. Y. (4 Seld) 525, 552.

obscure,[5] is much disputed and greatly perplexed,[6] its lights being in no small degree "shadowy, obscure and flickering,"[7] and is involved in such doubt that much can be said on both sides.[8] It has, therefore, not been easy "to arrive at a satisfactory conclusion as to how far the present authority and doctrines of the court of chancery, in regard to charitable uses, depend upon the statute of Elizabeth, and how far they arise from its general jurisdiction as a court of equity to enforce trusts, and especially trusts to pious uses."[9] Much labor and research has been spent on the subject and a vast amount of legal learning has been elicited.[10] Few questions have been the subject of more laborious investigation, or have given rise to a greater conflict of opinion.[11] A perfect maze of antiquarian research and abstruse learning surrounds the question and makes thorny the path of the investigator.[12]

§ 14. **Aids Available Summarized.** But while the subject is difficult, it is not absolutely forbidding. The pathway of the enquirer is lighted up by opinions and decisions of the ablest English and American judges.[13] These, in the more important cases, have been aided by the best counsel of their day, who, in turn, spurred on by the great public interest in the litigation, have done their utmost properly to represent their respective clients. With such aid it is now a reasonable undertaking to explore this field.

§ 15. **Purpose of Statute. English Construction.** It has already been mentioned that the question "whether equity has inherent jurisdiction over charities" has for a long time been a purely academic inquiry in England.[14] The plain object of the statute of Elizabeth was to place in the hands of a commission a troublesome branch of the royal prerogative, subject only to the revising and controlling power of the Lord Chancellor. This power, though only secondary or

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[5] 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 187.

[6] 1839, McIntire Poor School v. Zanesville Canal and Mfg. Co., 9 Ohio 203, 287, 34 Am. Dec. 436.

[7] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 193, 11 L. Ed. 205; 1847, State v. Griffith, 2 Del. Ch. 392, 415.

[8] 1862, Williams v. Pearson, 38 Ala. 299, 306; 1836, Moore v. Moore, 34 Ky. (4 Dana) 354, 360, 29 Am. Dec. 417.

[9] 1850, Yates v. Yates, 9 Barb. 324, 335 (N. Y.).

[10] 1848, Griffith v. State, 2 Del. Ch. 421, 455.

[11] 1862, Williams v. Pearson, 38 Ala. 299, 304.

[12] 1857, McCaughal v. Ryan, 27 Barb. 376, 390 (N. Y.).

[13] 1848, Griffith v. State, 2 Del. Ch. 421, 455.

[14] See Section 6 **Supra.**

appellate, nevertheless was absolute and final, and soon swallowed up its parent and became original and absolute. In reaching this result, the English chancery courts have gone a great distance beyond the statute, taking hold of the words "limited" and "appointed" in its preamble as the germs of a system of decisions whose principles cannot be traced to any of its enacting clauses.[15] "The fashion has everywhere been to enlarge, but never to circumscribe the operation of the statute."[16] The jurisdiction of the chancellor has thus been greatly enlarged either by operation of the statute, or, what is more likely, by an assumption of power on his part based on the statute by construction whether well or ill-founded.[17] In every case, however, it was the statute which was the deciding factor, while the question "whether equity had jurisdiction independently of it" was not material.

§ 16. **English Dicta.** It follows that any opinions expressed by English judges subsequent to the time of Elizabeth on the question of the inherent power of equity over charitable trusts are mere dicta. In addition they are quite conclusively in the nature of hearsay evidence being uttered by men who could have no personal knowledge of the pre-Elizabethan situation. Last but not least they are not harmonious but group themselves on both sides of the controversy. The most that can be said of them is that the "better opinion"[18] of the most eminent jurists in England inclines toward upholding the inherent power of equity over charitable trusts. Since better evidence is available, no detailed discussion of these dicta will be attempted. Some of them are valuable for their reasoning, while others owe what value they have to their authors. They have been industriously collected and commented upon in a number of cases to which such readers as are interested in this kind of evidence are hereby referred.[19]

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[15] 1827, Witman v. Lex, 17 Serg. & R. 88, 92, 17 Am. Dec. 644 (Pa.).

[16] 1848, Wright v. Linn, 9 Pa. (9 Barr) 433, 435.

[17] 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 190.

[18] 1858, Preachers' Aid Society v. Rich, 45 Me. 552, 559. See also 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 124 App. Div. 664.

[19] 1847, State v. Griffith, 2 Del. Ch. 392, 416; 1848, Griffith v. State, 2 Del. Ch. 421, 463; 1860, Chambers v. St. Louis, 29 Mo. 543, 584; 1850, Yates v. Yates, 9 Barb. 324, 335 (N. Y.); 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 194, 11 L. Ed. 205;

§ 17. **Testimony of Francis Moore, the Draftsman of the Statute.** When, after many years of agitation, the crying need for the statute at last reached the understanding of the necessary majority of the English parliament, the task of drafting it was delegated to Francis Moore, a learned sergeant and member of that body. It is fortunate that Moore, whose first-hand knowledge cannot be doubted, can be placed upon the witness stand. Due probably to his connection with the statute, he spent much of his time in "reading" upon it in the middle temple hall at London. These readings have been preserved and are of high authority as a contemporaneous exposition of the statute.[20] For our purpose they are, however, far more important for the information which they do not than for the information which they do contain. If the purpose of the statute had been to create a new jurisdiction, to make legal what heretofore had at the very least been extra-legal, it is inconceivable that this purpose should have been ignored by the very draftsman of the act. Yet such is the fact. The readings, in addition, contain certain positive allegations which cannot well be reconciled with such a contention.[1] The conception that an entirely new jurisdiction had been created by the statute, therefore, never entered the mind of its very draftsman. Yet this thought would have naturally been the very center of his discussion had there been any basis of fact for it. It would seem to follow that no such jurisdiction was in fact created.

§ 18. **Historical Facts Supporting Such Testimony.** The testimony of Moore, however, while persuasive, is not sufficient, even in connection with the most favorable dicta to make a prima facie case. In a legal proceeding involving a document, the courts, to determine its meaning, do not inquire into the opinion of its draftsman, but look at the document itself and the circumstances out of which it has arisen. We shall follow this course. These circumstances fortunately can be traced back for centuries into the legislative, judicial and general history of England, and throw a flood of light on the

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1819, Philadelphia Baptist Ass'n v. Hart, 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499. See an article in 1 Am. L. Reg. (N. S.) 129, 399.

[20] See Duke on Charitable Uses 122, 191; Boyle on Charities 465-505.

[1] See an article in 1 Am. L. Reg. (N. S.) 129, 397.

statute. Says the Connecticut court: "The technical rules of the common law, statutes of mortmain, and other restraining English statutes, operated very effectually to defeat the benevolent intention of testators, and of grantors to public and private charities. To remedy what were supposed to be some of the evils of the former laws on this subject, the statute 43d Elizabeth was enacted."[2]

§ 19. **Statutes Passed Before 1530.** It is a well recognized rule of evidence that public statutes are admissible in evidence to prove facts recited by them. Surely, if statutes are evidence for the consideration of a court or jury in a suit between individuals, they are at least equally admissible to prove the law as it existed prior to their passage. An English statute passed in 1414 provided for the investigation and correction of certain abuses which had developed in hospitals "founded as well by the noble king of this realm, and lords and ladies both spiritual and temporal, as by divers other estates, to the honor of God and of his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the same founders have given a great part of their movable goods for the building of the same, and a great part of their lands and tenements, therewith to sustain impotent men and women, lazers, men out of their wits, and poor women with child, and to nourish, relieve and refresh other poor people in the same."[3] The abuse originating where more than one executor was named in a will, and one or more refused to act, was corrected in 1529 by providing that less than all of the executors might in such cases act and bind the estate. The purposes of the wills in question were stated to cover, among other things, "charitable deeds to be done and executed by their executors for the health of their souls," while the consequence of the executors' refusal to act, which was corrected by the statute, was stated to be that "the legacies and bequests made by the testator to his wife, children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator, as also

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[2] 1845, American Bible Society v. Wetmore, 17 Conn. 181, 187.

[3] 2, Henry V., chapter 1.

to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God."[4]

§ 20. **Statute of Superstitious Uses.** The statute just mentioned was passed during the time of the reformation. Only two years later, in 1531, parliament went a step farther aiming a statute against "superstitious uses," a term which now for the first time made its appearance and which covered uses which had grown out of the old order of things when the Catholic church ruled supreme. Such uses were not uprooted altogether, but were allowed to continue for twenty years. The preamble of this statute recited that conveyances had been made to the use of parish churches, chapels, church wardens, guilds, fraternities, commonalties, companies or brotherhoods erected and made of devotion, or by common assent of the people without any corporation, or to the uses and intents to have obits perpetual, or a continual service of a priest forever or for threescore or fourscore years, and that out of such conveyances there had grown and issued to the king and to other lords and subjects of the realm the same like losses and inconveniences as had resulted from cases where land had been aliened into mortmain.[5] The passage of this statute shows clearly "that at common law, the want of a charter of incorporation was no impediment to a body of men, changing from time to time, from receiving and distributing according to the intent of the donor, money, or other property given or granted for a charitable use."[6]

§ 21. **Other Historical Evidence. Mortmain Statutes.** The evidence thus furnished by statutes is born out by the general history of the English nation. England had been Christianized long before the Norman conquest, and with Christianity had come such charitable institutions as are constantly springing up in every Christian country and distinguish the Christian world from the Pagan. These institutions were largely religious with a sprinkling of charities for the poor, and with only a few charities of an educational character.[7] They have led to the enactment of numerous mortmain statutes which need not be commented on. They

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[4] 21, Henry VIII., chapter 4.
[5] 23 Henry VIII, Chapter 10. See 1 Am. L. Reg. (N. S.) 333.
[6] 1835, Burr v. Smith, 7 Vt. 241, 278, 29 Am. Dec. 154.
[7] 1835, Burr v. Smith, **Supra.**

were so prevalent even in Saxon England that the Abbot of St. Albans is said to have told William the Conqueror that the reason for his sweeping success at Hastings was "because the land, which was the maintenance of **martial** men, was given and converted to **pious** employments, and for the maintenance of holy votaries."[8] During the reformation, most of these charities, centering as they did around monasteries, were broken up as superstitious uses. This abrupt dissolution released on society hordes of idle and impotent poor whose lives had hitherto been spent near the gates of the religious houses. The clamorous demands of this wretched, starving mob compelled legislative action which resulted in the statute of Elizabeth. By this legislation the domain of charity by mere wayward instinct came to an end, and the reign of more intelligent action was ushered in. It is but reasonable to deduce from the continual existence of these institutions for centuries before the statute, that questions concerning them must have come before the courts and must have been decided in their favor. Says the New York Court: "As devices, donations and bequests to pious and charitable uses, which were well known to the civil law, were common in England, long before the statute of Henry the Eighth had turned ordinary uses into legal estates, it would indeed be strange if the court of chancery had not at that time assumed the same jurisdiction over conveyances and bequests to charitable and pious uses, as it had over conveyances to the use of particular individuals."[9]

§ 22. **The Custom of the Ordinary.** A custom, by which a portion of the residue of every man's estate was applied by the ordinary to charity until the Statute of Distribution,[10] passed long after the statute of Elizabeth in the reign of Charles the Second, abolished the custom, illustrates the favor with which charities were regarded at common law. If the estate of a person, who left no will indicating a charitable intention, was nevertheless made to yield up a part of its

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[8] 1839, Lathrop v. Commercial Bank, 38 Ky. (8 Dana) 114, 122, 33 Am. Dec. 481.

[9] 1838, Reformed Protestant Dutch Church v. Mott, 7 Paige 77, 79, 32 Am. Dec. 613 (N. Y.).

[10] 22, Charles II chapter 10. See 1802, Moggridge v. Thackwell, 7 Vesey 36, 69; 1875, Doughten v. Vandever, 5 Del. Ch. 51, 63; 1854, Fontain v. Ravenel, 58 U. S. (17 How.) 369, 388, 15 L. Ed. 80.

residue to charity on the ground that there is a general principle of piety and charity in every man,[11] it may reasonably be assumed that an express testamentary disposition, giving property in whole or part to charity, would not be disregarded by the courts. "To maintain a charity expressly declared by the testator, seems to follow naturally from the former power of the Ordinary to apply a part of every man's personal estate to charity."[12]

§ 23. **Chancery Cases antedating the Statute.** The evidence so far introduced is circumstantial rather than direct. It would probably be sufficient to make a prima facie case and shift the burden of proof. It is not necessary, however, to take any chances. Direct proof is available that equity had inherent jurisdiction over charities long before the statute. While reported cases in the conventional sense are not in existence, because both reporting and equity jurisprudence were then in their infancy, we are not without light. Hidden away in musty files, some fifty unreported cases slumbered for centuries, but contained within themselves strong if not conclusive evidence in support of our contention. This "unreported jurisprudence of the middle ages"[13] has been made available through the researches of an English Record Commission. It is, of course, to be expected that slurs should have been thrown on it. It has been stated that "the searching into the chancery office of England, at a time anterior to the reign of Elizabeth, for principles of chancery jurisdiction, as applicable to our system of government and jurisprudence, would be like looking for a live body in an Egyptian catacomb."[14] It has been charged that such investigation has been fruitful in cases but barren in results, and that the result of unwearied and exhaustive research has been merely to widen the diversity of judicial and professional opinion.[15] It has been indicated that this evidence merely shows that "the priestly chancellors of those remote ages sometimes assumed a jurisdiction to enforce pious, benevolent, super-

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[11] 1887, Hunt v. Fowler, 121 Ill. 269, 281, 12 N. E. 331.

[12] 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 128, 9 Am. Dec. 619.

[13] 1865, Levy v. Levy, 33 N. Y. 97, 107.

[14] 1844, Green v. Allen, 24 Tenn. (5 Humph) 170, 189.

[15] 1866, Bascom v. Albertson, 34 N. Y. 584, 602, 603.

stitious and other indefinite trusts, as the Record Commission shows they did sometimes in cases of assault and battery, abduction and breach of the peace."[16] It must indeed be admitted that these cases are not as clear as might be desired. They are couched in the crabbed language of the time and are otherwise quite imperfect. It is difficult to ascertain from them to what extent donations to charitable uses were upheld, and in what manner they were enforced.[17] But despite all these defects, this curious and interesting collection establishes in the most satisfactory manner that cases of charities were then familiarly known to and acted upon and enforced in the chancery courts, and dispels the doubts that have been entertained.[18] We shall not review these cases in detail. The reader who desires to pursue this matter farther will find a schedule of them as a part of the argument in **Vidal v. Girard.**[19]

§ 24. **Preamble of Statute.** We might very well rest our case at this point. It will, however, not be well to ignore the most important testimony. The preamble of the statute of Elizabeth makes the statute itself a decisive witness. In fact, it is this preamble which is important since its remedial provisions constituting its bulk and intended to be its main part have proved to be cumbersome, have become obsolete, are inapplicable to America and have even been expressly repealed in England.[20] This preamble reads as follows:

Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well disposed persons; some for relief of aged, impotent and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, seabanks and highways; some for education and preferment of orphans; some for or toward relief, stock or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid or help of young tradesmen, handicraftmen and persons decayed; and others for relief or redemption of prisoners or captives,

[16] 1865, Levy v. Levy, 33 N. Y. 97, 106.

[17] 1839, Burbank v. Whitney, 41 Mass. (24 Pick.) 146, 152, 35 Am. Dec. 312.

[18] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 196, 11 L. Ed. 205.

[19] 43 U. S. (2 How.) 127, 155, 11 L. Ed. 205. See note 1, L. R. A. 417, 418.

[20] Charitable Uses and Mortmain Act of 1888. The preamble, however, has remained in force. See an article 100 L. T. 55.

and for aid or ease of any poor inhabitants concerning payments of fifteens, settings out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same; for redress and remedy whereof, be it enacted.[1]

This rather verbose recital may conveniently be abbreviated as follows: Whereas property, real and personal, has been heretofore donated both by the royal family and by other well disposed persons to eleemosynary, educational, ecclesiastical and municipal purposes, but has not been employed according to the charitable intent of the donors by reason of frauds, breaches of trust and negligence of its trustees; for redress and remedy thereof be it enacted.

§ 25. **Conclusiveness of the Statute.** On reading the statute carefully, one cannot but feel surprised that doubts as to its meaning could have ever existed. It is purely remedial on its very face.[2] Its very title is: "An act to redress the misemployment of lands, goods and stocks of money heretofore given to certain charitable uses." It is declarative of the existing law,[3] is cumulative and ancillary, not extending the power of testators, but furnishing more available remedies to legatees,[4] did not create any new law,[5] did not change in any manner the jurisdiction of the chancery courts as it previously existed,[6] but only regulated a jurisdiction which was already inherent in them.[7] There is not a word in it "to render valid that which was invalid, or that legal which theretofore had been illegal."[8] Its only object is to provide a new remedy against the abuse of existing charities.[9] Its statement that the many charities enumerated

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[1] 43, Elizabeth, chapter 4.

[2] 1877, Ould v. Washington Hospital, 95 U. S. 303, 309, 310, 24 L. Ed. 450, (affirming 1 MacArthur 541, 29 Am. Rep. 605); 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 192.

[3] 1884, Pell v. Mercer, 14 R. I. 412, 435.

[4] 1858, Tappan v. Deblois, 45 Me. 122, 130.

[5] 1871, Grimes v. Harmon, 35 Ind. 198, 245, 247, 9 Am. Rep. 690; 1848, Griffith v. State, 2 Del. Ch. 421, 463.

[6] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 555, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[7] 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 369; s. c. 4 Iowa 252.

[8] Lord Sugden in Incorporated Society v. Richards, cited in 1860, Chambers v. St. Louis, 29 Mo. 543, 585.

[9] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 545.

have not been employed according to the charitable intent of the donors is inconsistent with the theory that such charities had no legal existence. "Frauds and breaches of trust are terms that could not be applied to things whose existence was not recognized by law."[10] Furthermore, since the statute applied to existing charities, a contention that it merely validated them, leads to great difficulties. "If we suppose charitable donations to have been void before this statute, then the proceedings which it authorizes were intended to strip heirs and next of kin of their property, and to set on foot a class of eleemosynary establishments in violation of vested legal rights."[11] Therefore the statute itself, far from attempting to create any new equity jurisdiction, actually, in the most solemn form, recognizes the existing inherent power of chancery over charitable trusts, and by itself, and certainly in connection with the other evidence adduced in this chapter, makes a case so strong that it cannot be overcome by any contrary testimony.

§ 26. **Summary.** Charity can clearly be traced into the Mosaic law, but is foreign to the jurisprudence of purely Pagan peoples. It received its greatest impetus through the rise of Christianity and became a part of both the civil and the common law. It gained its supreme legislative recognition in England by the statute of Elizabeth passed in 1602. It existed independently of the statute, however, as appears from the commentaries of its draftsman, the custom of the ordinary in apportioning a part of the residue of each man's estate to charity, the recognition accorded to it long before 1602 by cases arising in the courts and by statutes passed by parliament, and by the very terms of the statute itself and the construction placed upon it by eminent judges. While the subject has been thrown into confusion in the United States through an early United States Supreme Court case, there can be no question but that its independence from the statute of Elizabeth is now all but universally recognized on this side of the Atlantic.

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[10] 1860, Chambers v. St. Louis, 29 Mo. 543, 484.

[11] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 546.

CHAPTER II

AMERICAN DEVELOPMENT

§ 32. **Grouping of States. General Principles.** The development of the law of charities in the various states of the Union is intimately interwoven with the early state histories, with statutory enactments or constitutional provisions making unlawful certain testamentary gifts, or abolishing all trusts except as expressly authorized and modified, or repealing or adopting all English statutes, or adopting merely the common law or ignoring the subject altogether. Accordingly, the forty-eight states now composing the Union can be classified into distinct groups. The primary division, of course, is into states which, through various processes, have or had abolished the English charity rule, and those which through one process or another have adopted it. These groups must again be subdivided into classes, each showing a development peculiar to itself, though all are tending in the same general direction.

§ 33. **Minority Group. General Situation.** The first or minority group, consisting of states which abolish or have abolished the English charity rule and maintain or have maintained a rule of their own, are divided historically into three sharply distinct classes. While the repeal of the statute of Elizabeth in most of these states has by no means been without influence, the deciding factor in the first class has been a case decided by the United States Supreme Court in 1820, while in the second it has been an attempt on the part of the legislature to codify the law of trusts. In the third class, consisting of only Mississippi, the most radical change has been effected by the adoption of a constitutional provision on the subject.

§ 34. **First Class of Minority Group Generally.** In regard to the first class of the minority group, the repeal of the statute of Elizabeth in Virginia before West Virginia was carved out of it, and in Maryland before the District of Columbia was ceded to the federal government in connection with the deference paid by the courts of these jurisdictions

to the case of **Philadelphia Baptist Ass'n v. Hart,**[1] which arose in Virginia, and in which the United States Supreme Court by its eminent Chief Justice Marshall had held that the English doctrine of charitable trusts was founded on the statute of Elizabeth, and was wiped out when that statute was repealed by Virginia in 1792, is at the foundation of developments. This federal decision has accordingly been designated by the Virginia court as "the source of all our trouble."[2]

§ 35. **Virginia. Early History.** When Virginia, in 1776, ceased to be an English possession, it was considered to be necessary, for the proper administration of justice, to continue in force for the time being the common law and all English statutes of a general nature so far as they were not repugnant to the new situation. Accordingly, the general convention of the state at once passed an ordinance by which such statutes made prior to the fourth year of James I, the year of the first settlement on its soil, were continued in full force and made the rule of decision until altered by the legislative power of the new state.[3] This enactment, so far as it related to any statute or act of parliament was, after Virginia had acquired a code of its own, repealed in 1792, the repealing statute providing that "no such statute or act of parliament shall have any force or authority within this commonwealth."[4]

§ 36. **Virginia. Later Development.** Excepting an early case decided in 1804, which held an unincorporated monthly meeting capable of acting as a trustee for a charity,[5] no case involving the question came before the Supreme Court of Virginia until after the Supreme Court of the United States

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[1] 17 U. S. (4 Wheat) 1, 4 L. Ed. 499. See Section 7, **supra.**

[2] 1889, Trustees v. Guthrie, 86 Va. 125, 146, 10 S. E. 318, 6 L. R. A. 321.

[3] Chapter 5, Section 6, laws of 1776. Statutes at Large of Virginia by W. W. Hening, Vol. 9, page 127.

[4] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 772; 1850, Wheeler v. Smith, 50 U. S. (9 How.) 55, 58, 13 L. Ed. 44; 1832, Gallego v. Attorney General, 30 Va. (3 Leigh) 450, 462, 24 Am. Dec. 650.

[5] 1804, Charles v. Hunnicutt, 9 Va. (5 Call) 311, 327, 328, 330. See also 1821, Richmond County v. Tayloe, 21 Va. (Gilmer) 336, which holds that by force of the Virginia statute of 1805, a charitable gift to an Episcopal church is vested in the overseers of the poor.

in **Philadelphia Baptist Ass'n v. Hart**[6] had decided that the law of charitable trusts was based on the statute of Elizabeth, and had fallen to the ground with the repeal of that statute. In view of the fact that this case arose in Virginia, and that the opinion handed down embodied the best information on the subject then available and was written by Chief Justice Marshall, it is not surprising that the Virginia court in 1832 followed it,[7] taking the position that charitable trusts stand on the same footing as other trusts, and will alike be sustained or rejected. Therefore, in the very language of the Virginia court, the Virginia charity doctrine "did not have its judicial birth in Virginia, but was an error copied from the Supreme Court of the United States."[8]

§ 37. **Virginia. Modification as to Church Charities.** This doctrine did not remain law in its entirety for any great length of time. By a curious Virginia theory of public policy, church corporations are proscribed in the Old Dominion state.[9] It is obvious that under this policy a congregation could not hold property as a corporation, and that under the decision of the court it could not hold it by trustees. No means were, therefore, available by which it could be secure in the possession of the plot of ground on which it had erected its house of worship. This condition was intolerable. Accordingly, the legislature was appealed to, and in 1839 and 1842[10] passed acts which validated conveyances to trustees for local church purposes,[11] whether such conveyances were made by deed or devise before, or by deed[12] after the enactment of the statute. These statutes were reënacted in 1849 and were extended to dedications of real property on the one hand, and to gifts of personal property on the other.[13]

§ 38. **Virginia. Modification as to other Charities.** The

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[6] 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499 (1819).

[7] 1832, Gallego's Executor v. Attorney General, 30 Va. (3 Leigh) 450, 462, 24 Am. Dec. 650.

[8] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 766.

[9] This policy was incorporated some time later into the constitution of the state. Art. 5, Section 17.

[10] 1889, Trustees v. Guthrie, 86 Va. 125, 150, 10 S. E. 318, 6 L. R. A. 321; 1899, Handley v. Palmer, 91 Fed. 948, 954 (affirmed 103 Fed. 39, 43 C. C. A. 100).

[11] 1856, Brooke v. Shacklett, 54 Va. (13 Grat.) 301.

[12] 1859, Seaburn v. Seaburn, 56 Va. (15 Grat.) 423.

[13] Chapter 77, Sections 8, 9, 10, 11, 12, 13. 1877, Kain v. Gibbony, 101 U. S. 362, 25 L. Ed. 813 (affirming Fed. Cas. No. 7595, 3 Hughes 397).

legislature did not stop with protecting transfers to religious bodies. While eleemosynary demands were quite well attended to at the time under a law passed in 1802, under which the property of the former church establishment in the state had been gradually passing to the commissioners of the poor in the various counties on the death or removal of the clergymen in charge in 1802, educational charities were not so well protected and needed a fostering care. Education was recognized as an object so desirable that obstacles to private munificence in its favor should be eliminated. Accordingly, the legislature in 1839 validated testamentary gifts for such purposes, but retained the right to declare them void. This statute was amended in 1860 by declaring valid all such gifts made since 1839 and not since invalidated by legislative action.[14] The feeling toward such gifts was so friendly that a further statute was passed in 1874 "to give effect to a compromise of the litigation in respect to the construction and effect of the will of Samuel Miller, deceased, and to establish the manual labor school provided for in the twenty-fifth clause of said will."[15] Just what classes of "indefinite charities"[16] are now validated in the state thus depends upon the statutes. It is to be hoped that eventually, through legislative action, the system of charitable trusts thus partly reinstated will receive full recognition.

§ 39. **Attempt of Virginia Court to break its Fetters.** The Virginia court has not always adhered to its own charity doctrine, followed though it had been in numerous cases,[17] and recognized as it was by the legislature through the enactment into law of exceptions to it. After the leading case on the subject already referred to had not only stood unchallenged for more than fifty years, but had repeatedly been

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[14] Code of 1860, Chapter 80, Section 2. 1870, Kelly v. Love, 61 Va. (20 Grat.) 124, 131, 132.

[15] 1874, Kinnaird v. Miller, 66 Va. (25 Grat.) 107, 111. See 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 759, 760. Other legislative acts have followed. 1917, Pirkey v. Grubb, 122 Va. 91, 94 S. E. 344. See Virginia Statutes of 1887, Chapter 65, in favor of educational charities.

[16] 1874, Roy v. Rowzie, 66 Va. (25 Grat.) 599, 607-610.

[17] 1856, Brooke v. Shacklett, 54 Va. (13 Grat.) 301, 309; 1859, Seaburn v. Seaburn, 56 Va. (15 Grat.) 423, 425; 1872, Commonwealth v. Levy, 64 Va. (23 Grat.) 21, 40; 1884, Petersburg v. Petersburg Benevolent Mechanics Ass'n, 78 Va. 431, 436.

reaffirmed, the court finally made a desperate attempt to over-rule it. This step was taken in 1885, the court explaining that the act of 1792 did not repeal the statute of Elizabeth.[18] The same position was taken when the question came up again in 1889. The court stated that the opinion in the former case was prepared "after the most thorough investigation, in which every available source of information was consulted, lest some landmark of the law, firmly embedded in principle, might receive the rude touch of judicial action without due consideration."[19] This attempt to cure a judicial error by judicial legislation, however, finally proved to be abortive, since the court in 1897 returned to its old doctrine, stating that the law was settled by a long line of decisions founded, though they were on erroneous conceptions, and was subject to change only by the legislature. The discussions in the cases arising in 1885 and 1889 were declared to be unnecessary to the decisions rendered, and were branded as mere **obiter dicta** not binding on the court.[20] This line of reasoning has been approved in later cases so that the state, except for the action of its legislature, is still in the same situation in which it was placed by the early decision of its court.[1]

§ 40. **West Virginia. Adoption of Virginia Rule.** When West Virginia, during the strain and stress of the Civil War, tore loose from Virginia and set up its own household, it was but natural that it should retain practically all the law written and unwritten by which its territory had theretofore been governed. Among the law so retained was that relating to charitable trusts. Accordingly, the supreme court of the new state in 1873 and 1876 expressly approved the principles of the leading Virginia case,[2] and explained that its doctrine was not intended to banish charity, not to dry up the streams of charitable feelings and actions, but to control to a limited

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[18] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 772.

[19] 1889, Trustees v. Guthrie, 86 Va. 125, 148, 10 S. E. 318, 6 L. R. A. 321.

[20] 1897, Fifield v. Van Wyck, 94 Va. 557, 570, 27 S. E. 446, 64 Am. St. Rep. 745.

[1] 1907, Jordan v. Richmond Home for Ladies, 106 Va. 710, 718, 56 S. E. 730, 710, 718; 1907, Jordan v. Universalist General Convention Trustees, 107 Va. 79, 85, 57 S. E. 652.

[2] 1873, Bible Society v. Pendleton, 7 W. Va. 79, 86, 87; 1876, Knox v. Knox, 9 W. Va. 124, 145.

extent the manner of their operation.[3] After the Virginia court, in 1885 and 1889, attempted to break away from the old doctrine,[4] the West Virginia court, long before this attempt was declared to be abortive in Virginia, expressly refused "to depart from the line of safe precedents established by the court of appeals of Virginia * * * and followed by this court to the present time."[5] Except for statutory modifications, the law of West Virginia, therefore, in regard to charitable trusts, is to-day the same as it was in Virginia in 1832.

§ 41. **West Virginia. Statutory Modification.** The statutory law in the two states is very much alike. It was but natural that the new state should retain the code of Virginia for a time, and that it should liberally copy from it when it adopted a code of its own. This was accordingly done in 1869[6] in regard to the Virginia statute in relation to charitable trusts, thus restoring charitable uses and trusts **pro tanto.**[7] Any exception to the West Virginia rule must, therefore, be found in the statutes.

§ 42. **Maryland. General Situation.** The constitution of Maryland adopted, in 1776, in the third section of its bill of rights, declared that the inhabitants of the new state are entitled to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience had been found applicable to them. A report of the Maryland statutes was later compiled, published and distributed by one Kilty, under the sanction of the state for the use of its officers. In this volume, the statute of Elizabeth was classed among those which had been found inapplicable. This report was adopted by the Maryland court in 1822 as "a safe guide in exploring an otherwise very dubious path,"[8] which decision, in connection with the case of **Philadelphia Baptist Ass'n v. Hart,**[9] decided three years earlier by the United States Supreme Court, definitely fixed the law of the

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[3] 1873, Bible Society v. Pendleton, 7 W. Va. 79, 90 (cited); 1886, Wilson v. Perry, 29 W. Va. 169, 191, 1 S. E. 302.

[4] See Section 39, **supra.**

[5] 1886, Wilson v. Perry, 29 W. Va. 169, 195, 1 S. E. 302.

[6] 1873, Bible Society v. Pendleton, 7 W. Va. 79, 89; 1876, Knox v. Knox, 9 W. Va. 124, 140.

[7] 1913, Hays v. Harris, 73 W. Va. 17, 19, 80 S. E. 827.

[8] 1822, Dashiell v. Attorney General, 5 Har. and J. 392, 403, 9 Am. Dec. 572; followed s. c. 6 Har. and J. 1. (Md.).

[9] 17 U. S. (4 Wheat) 1, 4 L. Ed. 499.

state.[10] The decision rendered in 1822, though not the first in the state,[11] not only remained unchallenged, but was followed by the federal[12] and the state court,[13] thus determining the law beyond the power of subsequent judges to add or detract. It follows that a charitable trust cannot be upheld in Maryland unless the **cestui que trustent** are defined and capable of enforcing its execution by proceedings in a court of chancery.[14]

§ 43. **Maryland Statutory Relief.** The relief afforded by the Maryland legislature has been extraordinarily meager. It was not until 1888 that it was provided as an amendment to the state statute of wills, that no devise or bequest for any charitable use shall be void for uncertainty of its beneficiaries, provided that it contains directions for the formation of a corporation to receive and administer the gift within twelve months from the grant of probate of such will or codicil.[15] It is evident that this enactment is a long ways from reëstablishing the statute of Elizabeth or the doctrine of charitable trusts in force in England. It has been applied to a will made before its passage but becoming effective thereafter,[16] but creates a mere executory devise,[17] and does not set aside the long established policy of the state.[18] It has been held inapplicable to a case where the corporation was in existence when the will became effective.[19]

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[10] 1822, Dashiell v. Attorney General, 5 Har. and J. 392, 398, 9 Am. Dec. 572; followed s. c. 6 Har. and J. 1 (Md.).

[11] 1819, Trippe v. Frazier, 4 Har. and J. 446 (Md.).

[12] 1850, Meade v. Beale, Fed. Cas. No. 9371, Taney 339, 2 Car. Law. Rep. 329.

[13] 1867, State v. Warren, 28 Md. 338, 353; 1876, Dumfries v. Abercrombie, 46 Md. 172, 180; 1882, Rizer v. Perry, 58 Md. 112, 116; 1900, Missionary Society v. Humphreys, 91 Md. 131, 143, 46 Atl. 320, 80 Am. St. Rep. 432; 1912, Book Depository v. Church Room Fund, 117 Md. 86, 91, 83 Atl. 50; 1914, Novak v. Orphan's Home of Baltimore, 123 Md. 161, 90 Atl. 997, Ann. Cas. 1915, C. 1067.

[14] 1881, Church Extension M. E. Church v. Smith, 56 Md. 362, 397; 1885, Isaacs v. Emory, 64 Md. 333, 337, 1 Atl. 713; 1886, Maught v. Getzendammer, 65 Md. 527, 533, 5 Atl. 471, 57 Am. Rep. 352; 1892, Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 282, 23 Atl. 781; 1886, Crisp v. Crisp, 65 Md. 422, 5 Atl. 421; 1884, Barnum v. Baltimore, 62 Md. 275, 292, 50 Am. Rep. 219; 1912, Gambell v. Trippe, 75 Md. 252, 254, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235.

[15] Section 328, article 93, Annotated Code of Maryland.

[16] 1890, Chase v. Stockett, 72 Md. 235, 238, 19 Atl. 761.

[17] 1916, Gray v. Peter Gray Orphan's Home, 128 Md. 592, 98 Atl. 202.

[18] 1893, Yingling v. Miller, 77 Md. 104, 108, 26 Atl. 491.

[19] 1893, Yingling v. Miller, 77 Md. 104, 109, 26 Atl. 491.

§ 44. **Maryland. Gift inter Vivos.** But while the Maryland court has been very stringent, not only in upholding its doctrine of charitable trusts where the question was between the heirs of the donor and the intended trustee, but also in construing the statute passed by the legislature, it has been correspondingly liberal in upholding such trusts where the question has been presented in other proceedings. While fully recognizing that a gift by **will** to an unincorporated charitable association is invalid, it has deliberately held over the dissent of some of its members that a gift to such an association consummated **inter vivos** is valid and enforcible. Says the court: "A deceased donor who speaks through his will, and who must make the law the instrument for the accomplishment of his wishes, is under limitations which do not apply to a living donor who bestows his bounty by his own act upon objects which he himself identifies."[1] In a case in which a corporation had for a consideration granted certain privileges on its premises to an association of Methodist preachers and missionaries, but now tried to go out of business without making any provision for the obligation thus assumed, the court interfered on the ground that such action would be tantamount to a fraud, both on the original contributors and on the association for whose benefit such contributions had been made.[2] In another case, the court has invoked the doctrine of adverse possession even as against the state to uphold the possession and right to sell of a charitable donee unauthorized by the law of the state to take the gift in the first instance.[3] In view of these decisions, it is quite clear that the court, while it still follows the doctrine early established, does so merely because it is entrenched by authority which it does not feel called upon to break down.

§ 45. **District of Columbia.** When the United States Constitution was adopted in 1789, the new nation was without a capital. After a spirited contest in which the leading cities of the country participated, partly through a compromise effected by Alexander Hamilton, partly in deference

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[1] 1911, Snowden v. Crown Cork and Seal Co., 114 Md. 650, 661, 80 Atl. 510, Ann. Cas.; 1912, A. 679.

[2] 1912, Book Depository v. Church Room Fund, 117 Md. 86, 83 Atl. 50.

[3] 1914, Novak v. Orphan's Home of Baltimore, 123 Md. 161, 90 Atl. 997, Ann. Cas. 1915, C. 1067.

to the wishes of President Washington, the site of the city of Washington was selected in 1790, cessions of territory on the part of both Virginia and Maryland were obtained, and the District of Columbia was brought into existence. The part ceded by Virginia was retroceded in 1846, leaving the Maryland law as the rule of decision in the new territorial subdivision.[4] Accordingly, the United States Supreme Court has cited the leading Maryland case as authority for the proposition that the statute of Elizabeth is not operative in the district.[5]

§ 46. **Second Group of Minority States. Reasons for Aberration.** It has been seen that the decisions in the first class of the minority group, so far considered, rest on the same basis, and that such differences as exist are due to legislative action. The same general rule holds good in regard to the second class. While the results obtained in the four states composing this class are not entirely uninfluenced by **Philadelphia Baptist Association v. Hart,**[6] and in two of them by the repeal of the statute of Elizabeth, they rest primarily on a codification of the law of trusts originated by New York and copied by Michigan, Wisconsin and Minnesota, which abolished all trusts except as expressly authorized and modified.

§ 47. **New York. Repeal of English Statutes.** The first constitution of New York, adopted in 1777, declared that such parts of the statute law of England and of the acts of the legislature of the colony of New York, as together formed the law of the colony on the 19th day of April, 1775, and were consistent with the new order and did not establish any church or recognize the English king, "shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time,

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[4] 1827, Barnes v. Barnes, Fed. Cas. No. 1,014, 3 Cranch C. C. 269; 1840, Newton v. Carberry, Fed. Cas. No. 10,190, 5 Cranch C. C. 632; 1879, District of Columbia v. Washington Market Co., 3 MacArthur 559, 578 (affirmed 108 U. S. (2 Pet.) 566, 583, 7 L. Ed. 521. See 1829, Beatty v. Kurtz, 27 U. S. 243, 2 S. Ct. 543, 27 L. Ed. 714). (Affirming Fed. Cas. No. 7,950, 2 Cranch C. C. 699).

[5] 1877, Ould v. Washington Hospital, 95 U. S. 303, 309, 24 L. Ed. 450 (Reversing on this point 1 MacArthur 541, 552, 29 Am. Rep. 605). But see 1922, Washington Loan and Trust Co. v. Hammond, 278 Fed. 569.

[6] 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499.

make."[7] In accordance with this provision, and in view of the fact that these various statutes were contained in a great number of volumes and were written in a style deemed improper for the statute books of the new state, a commission of two persons was appointed by the legislature on April 15, 1786, to collect and reduce into proper form such statutes as were still in force for the purpose of having them re-enacted "to the intent that when the same shall be completed, then, and from thenceforth, none of the statutes of England, or of Great Britain, shall operate, or be considered as laws of this state."[8] Accordingly, many colonial and state statutes were expressly repealed on March 12, 1788,[9] and the first compilation of the laws of New York was published in 1789 and contained none of the English statutes,[10] thus impliedly, to say the least, repealing among other statutes the statute of Elizabeth.[11]

§ 48. **New York Trust Statute. Early Construction.** It is hardly necessary to say that this legislation was not particularly aimed at the statute of Elizabeth. The subject of charities under the primeval conditions then prevailing even in New York was barely thought of, much less mentioned. This condition of affairs continued through more than the first quarter of the nineteenth century. It is, therefore, not surprising that the legislature, when it passed the first real revision of the state statutes in 1827 and 1828, did not in any way mention charitable trusts when it abolished all uses and trusts "except as authorized and modified in this article."[12] This raised the important question whether charitable trusts were impliedly excluded from the operation of the statute, or covered by it. When this question was presented in 1844, the chancellor was startled by the contention "so contrary to the public interests, and so repugnant to the spirit of the age," that all charitable trusts springing from benevolent and not from interested motives should be abolished by a statute which did not even mention them, and

[7] New York Constitution, 1777, Section 35.

[8] Laws of New York, Ninth Session, Chapter 35.

[9] Laws of New York, Eleventh Session, Chapter 73.

[10] Jones and Varrick Laws of New York.

[11] 1849, Ayers v. M. E. Church, 5 N. Y. Super. Ct. (3 Sandf.) 351, 367, 8 N. Y. Leg. Obs. 17.

[12] 1, Revised Statutes of New York, 1829, page 727.

denied it because such trusts were not within the purview of the lawmakers, the evils which it was sought to remedy were not incident to them, the provisions enacted to preserve what was useful and beneficial in private trusts were inapplicable to the administration of charities, and because the statute referred merely to private trusts, and merely cut down those intricacies and refinements in the dealings of individuals with real estate which had perplexed conveyances and filled the courts with litigation.[13]

§ 49. **Attacks on such early Construction of New York Statute.** If this construction had prevailed, the courts of the state, as well as the courts of Michigan, Wisconsin and Minnesota, during the half century to follow, would have been saved from much embarrassment, and many gifts to worthy charitable objects would have been sustained for the benefit of the public rather than defeated for the benefit of the heirs. However, such a boon was not to be. Charitable trusts were rapidly multiplying, and keeping almost exact step with them came attacks by disgruntled heirs. The new statute afforded too magnificent an opportunity for a contention on the part of interested counsel to go unutilized. Nor did this contention fall on deaf ears. Accordingly, the New York supreme court in 1850 severely criticized the construction of the chancellor as judicial legislation, pointing out that the language of the statute was plain, distinct and emphatic, and signified that there should be a thorough and radical reform of this branch of the law and a total abrogation of express trusts for any and every purpose except as therein authorized.[14]

§ 50. **Early Repulse of such Attacks.** In 1853, the leading case of **Williams v. Williams**[15] came before the court of appeals. As this case did not involve any real estate, no

[13] 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 51 (N. Y.). Compare 1909, In re Sutro 155 Cal. 727, 102 Pac. 920 where a similar statute was construed.

[14] 1850, Yates v. Yates, 9 Barb. 324, 341 (N. Y.). See 1853, Voorhees v. Presbyterian Church of Amsterdam, 17 Barb. 103, 105 (N. Y.); 1858, Beekman v. People, 27 Barb. 260, 274 (Affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[15] 8 N. Y. (4 Seld.) 525. The court argued that, having adopted the common law of England, the law of charitable uses is in force here unless, 1, it was built up on an English statute which has been abrogated; 2, unless there is something in the system repugnant to our form of government; 3, unless it be shown by the history of our colonial jurisprudence that it was not in force here prior to the revolution; 4, unless it has been abolished by statute.

contention that it was affected by the trust statute of 1827 and 1828 could be maintained. The case of **Vidal v. Girard,**[16] decided in 1844 by the United States Supreme Court, had shed a flood of light on the subject, and established that the doctrine of charitable uses existed in England before the statute of Elizabeth, and that even the repeal of the statute did not affect the question. Accordingly, the court upheld the gift involved on the ground that jurisdiction over charities in the state existed independently of the statute.

§ 51. **Yielding of the New York Court to such Attack.** This decision, however, was the last ray of light preceding a total eclipse. Though sound, it did not remain the law in the state for any great length of time. The repeal of the statute of Elizabeth at a time when the law of charities was assumed to rest on it, and the subsequent abolition of the law of uses and trusts, except as reënacted by the repealing statute, were circumstances destined to exercise an overwhelming influence. The majority of the cases coming on related to real estate, and the contention that charitable trusts had been abolished, was vigorously pressed by eminent counsel. To this pressure the courts succumbed. A forty years' wandering in the wilderness began not unlike that which the children of Israel experienced after they left Egypt and before they reached the promised land.

§ 52. **History of such Yielding.** The process of overthrowing the Williams case is one very familiar to lawyers. It was distinguished on more or less substantial grounds in cases decided by the Court of Appeals in 1856[17] and 1861.[18] In 1865 the court deemed the time ripe to vigorously assail it, maintaining the thesis that the English system of charities

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[16] 43 U. S. (2 How.) 127, 11 L. Ed. 205.

[17] 1856, Owens v. Missionary Society, 14 N. Y. 380, 67 Am. Dec. 160. Says the court on page 387: "The law of charitable uses, as it has existed in England, may be ascertained with reasonable certainty; but how far that law prevails in this state, and to what extent our courts have succeeded to the powers exercised in the English courts of equity on the subject, depends upon considerations which are necessarily obscure."

[18] 1858, Beekman v. Bonsor, 23 N. Y. 298, 80 Am. Dec. 269; 1861, Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290. For dissenting opinion see 23 How. Prac. 4; 1861, Phelps v. Pond, 23 N. Y. 69. Says the court on page 107: "If there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement, is void, whether good or bad, wise or unwise."

was palpably incongruous with the state's political system, and the principles that lie at the basis of its government and institutions; not adapted to its social conditions, and impracticable of execution, and that by the repeal of the statute of Elizabeth it was not intended that "indefinite trusts of every kind and description, however irrational or absurd, superstitious, fanatical or idolatrous, should become valid in equity; and that the property of the donors, without limit or restraint, might, at their own will, and for the promotion of such objects, be withdrawn and put in mortmain, away from the general uses of society."[19] In the following year the same court declared that the abolition of the statute of Elizabeth was the abrogation of a system which had been tried and condemned and was not the revival of the ancient and odious system abrogated by it. Such ancient system was branded as fragmentary and disjointed, obscure in its origin, incongruous in its theory, disastrous in its tendency, discarded as an excrescence on the common law, inappropriate even to a government in which the crown and the mitre are in mutual alliance and dependence, and still more unsuited to a state in which every religion is free and ecclesiastics of whatever creed are subject to no restraint except that imposed by general legislation.[20] Accordingly, the court argued that the contention that the repeal of the English statutes was not intended to displace the English system of charitable trusts, but merely to sweep away the restraints which alone rendered it endurable even in a monarchy, and to inaugurate such ancient and obsolete system freed from all the salutary restraints of modern English legislation, would impute to the legislature of 1788, through heedless incaution circumventing its own intent, the exhuming to new life, in a free state of the buried abuses, of the old English court of chancery.[1] The controversy was practically closed in 1873, twenty years after it had been begun in the appellate court, and after it had exercised the best minds both upon the bench and at the bar. Says the court: "The sweeping provisions of the Re-

[19] 1865, Levy v. Levy, 33 N. Y. 97, 114, 116.

[20] 1866, Bascom v. Albertson, 34 N. Y. 584, 605.

[1] 1866, Bascom v. Albertson, 34 N. Y. 584, 614. Whether charity as to personal property was abolished in New York, see 1906, Loch v. Mayer, 100 N. Y. Supp. 837, 840, 50 Misc. 442.

vised Statutes, abolishing all uses and trusts, except those specially named, are sufficiently general and comprehensive to include all charities."[2]

§ 53. **Result of this Yielding by the New York Court.** The result of this wrecking process was sad enough. All original as distinguished from corporate charities were made void in the state. The only method by which a testator could devise his property to charity was to give it to a charitable corporation either as an absolute gift (where the corporation was in existence), or as an executory devise (where it had not as yet been formed). This abolition of "the huge and complex system of England, for many generations the fruitful source of litigation," despite the many wrecks of noble charities which it wrought, so impressed the appellate court in 1888, that it declared in an absurd excess of zeal, that charity had suffered no loss by this change, and that it was not certain "that any political state or society in the world offers a better system of law for the encouragement of property limitations in favor of religion and learning, for the relief of the poor, the care of the insane, of the sick and the maimed, and the relief of the destitute, than our system of creating organized bodies by the legislative power, and endowing them with the legal capacity to hold property."[3] With this state of affairs all attempts by mere reasoning to induce the court to return to the doctrine of the Williams case were useless.[4] Only legislative action could revitalize any original charity which any testator might create.[5]

§ 54. **Effect of Tilden Will on New York Law.** Our narrative must now take us back for many decades. In 1814, Samuel J. Tilden was born in New Lebanon, N. Y. After being admitted to the bar, he originated the system of railroad reorganization and consolidation that has since been in

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[2] 1873, Holmes v. Mead, 52 N. Y. 332, 338.

[3] 1888, Holland v. Alcock, 108 N. Y. 312, 335, 336, 16 N. E. 305, 2 Am. St. Rep. 420, 20 Abb. N. C. 447.

[4] 1889, Cottman v. Grace, 112 N. Y. 299, 307, 19 N. E. 839, 3 L. R. A. 145; 1891, Fosdick v. Hempstead, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715.

[5] For a discussion of this history see 1888, Holland v. Alcock, 108 N. Y. 312, 329, 337, 16 N. E. 305, 2 Am. St. Rep. 420; 1899, Allen v. Stevens, 161 N. Y. 122, 138-140, 55 N. E. 568; 1914, Utica Trust and Deposit Co. v. Thompson, 149 N. Y. Supp. 392, 397, 87 Misc. Rep. 31; 1894, Simmons v. Burrell, 8 Misc. Rep. 388, 28 N. Y. Supp. 625, 629, 59 N. Y. St. Rep. 554.

vogue. The legal affairs of a great many railroads, in consequence, passed through his hands. This work was very remunerative and made him wealthy. In addition, his opposition to the Tweed Ring in the early seventies made him a national figure and elevated him to the governorship of New York in 1875. His participation in the national campaign of 1876 as the democratic candidate for the presidency, in opposition to Rutherford B. Hayes, the republican candidate, his patriotic action in submitting to the decision of the electoral commission which decided the election for Hayes by a strictly partisan vote, are a part of the general history of the United States. After declining the democratic nomination for the presidency in 1880 and 1884, he died in 1886, leaving a will in which he left more than four-fifths of an estate appraised at over five million dollars "to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate." In 1891, the court of appeals was confronted with the question of the validity of this magnificent gift. Its decision, that it was invalid under the New York rule in relation to charitable trusts,[6] on account of the munificent proportions of the gift, the national prominence of the donor, and the noble purpose which had been frustrated, caused widespread discussion throughout the country.[7] This discussion bore fruit in 1893,[8] when the legislature of New York passed the "Tilden Act,"[9] which marked the departure of the state from the New York rule built up on the ruins of the system outlined in **Williams v. Williams,**[10] restored the law

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[6] 1891, Tilden v. Greene, 130 N. Y. 29, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487.

[7] 5 Harv. Law Rev. 389, 31 Am. Law Register (N. S.) 125, 235, 522, 23 Cent. L. J. 217, 364, 38 Alb. L. J. 369.

[8] 1899, Allen v. Stevens, 161 N. Y. 122, 140, 55 N. E. 568; 1908, In re Shattuck, 193 N. Y. 446, 450, 86 N. E. 455; 1912, In re Cunningham, 206 N. Y. 601, 605, 100 N. E. 437; 1899, Hull v. Pearson, 55 N. Y. Supp. 324, 36 App. Div. 224, 235; 1914, Utica Trust and Deposit Co. v. Thompson, 149 N. Y. Supp. 392, 399, 87 Misc. 31.

[9] 1914, Sailor's Snug Harbor v. Carmody, 211 N. Y. 286, 297, 105 N. E. 543; Chapter 701, Laws of 1893.

[10] 1893, Dammert v. Osborn, 140 N. Y. 30, 43, 35 N. E. 407 (rehearing denied, 141 N. Y. 564, 35 N. E. 1008).

as declared in that case,[11] and reversed the policy of the state.[12]

§ 55. **Tilden Act and its Amendments.** This act provided that no charitable gift, in other respects valid under the laws of the state, should be deemed invalid "by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries," declared that all such gifts made without designating a trustee should vest in the supreme court, and directed the attorney general to enforce such trusts by proper court proceedings. The act was amended in 1901 by adding a provision permitting a gift to be applied **cy pres** with the consent of the donor or grantor, if living, and if dead, after the expiration of twenty-five years from the date of the execution of the instrument where a literal compliance with the terms of the gift had become impracticable or impossible.[13] This twenty-five-year limitation was stricken out in 1909, so that the court is now at liberty to make such application at any time upon a proper showing, provided only that no such order be made "without the consent of the donor or grantor of the property, if he be living."[14]

§ 56. **Construction of Tilden Act.** This statute has received a very favorable construction. "The spirit of love and religion, which is the basis of charity,"[15] has been exercised in construing its provisions. As said by Judge Marshall of the Wisconsin bench, the court has been moved by the conception of the wrong that had judicially been done with the shadowy aid of the new written law, and by "an exhibition of heroics which has no parallel in the books," to turn backward to the starting point so unfortunately departed from, efface the half century of lamentable wandering and reintrench the principles of **Williams v. Williams.**[16] While

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11 1914, Sailor's Snug Harbor v. Carmody, 211 N. Y. 286, 298, 105 N. E. 543; 1899, Allen v. Stevens, 161 N. Y. 122, 141, 55 N. E. 568; 1905, Bowman v. Domestic and Foreign Missionary Society, 182 N. Y. 494, 75 N. E. 535; 1923, **In re** Potts Will, 199 N. Y. Supp. 880, 205 App. Div. 147.

12 1913, Warburton Ave. Baptist Church v. Clark, 142 N. Y. Supp. 1089, 158 App. Div. 230.

13 Chapter 292, Laws of 1901.

14 Laws of 1909, Chapters 45 and 52. Consolidated Laws of New York, Personal Property Law, Section 12, page 4170, Real Property Law, Section 113, page 4999.

15 1911, **In re** Robinson, 203 N. Y. 380, 385, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

16 1910, Maxcy v. Oshkosh, 144 Wis. 238, 273, 128 N. W. 899, 1138.

the statute, not being retroactive,[17] did not affect any rights that had vested under wills which had become effective before its passage; while a trust, void before the statute, could not operate as a power in trust as the purpose itself was then unlawful,[18] and while a direct and absolute gift to an unincorporated charitable society,[19] or to an association which has no existence in fact,[20] has been held void under it on the ground that the statute does not apply to absolute gifts, but only to gifts in trust;[1] while the statute has further been held not to validate gifts for charitable purposes in another state,[2] nor accumulations;[3] while the purpose of the gift must be stated with definiteness,[4] the beneficiaries may be uncertain and indefinite,[5] the selection of the particular charity to be

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[17] 1895, People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; 1904, Murray v. Miller, 178 N. Y. 316, 70 N. E. 870; 1894, Simmons v. Burrell, 8 Misc. Rep. 388, 28 N. Y. Supp. 625, 630, 59 N. Y. St. Rep. 554; 1895, Butler v. Parochial Fund, 92 Hun. 96, 36 N. Y. Supp. 562, 566, 71 N. Y. St. Rep. 758.

[18] 1904, Murray v. Miller, **supra.**

[19] 1906, Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; 1907, Fralick v. Lyford, 95 N. Y. Supp. 433, 107 App. Div. 543, affirmed, 187 N. Y. 524, 79 N. E. 1105; 1900, **In re** Scott, 64 N. Y. Supp. 577, 31 Misc. Rep. 85; 1910, Wait v. Society for Political Study, 123 N. Y. Supp. 637, 68 Misc. Rep. 245; 1911, **In re** Crompton's Will, 131 N. Y. Supp. 183, 72 Misc. Rep. 289; **Contra** 1899, **In re** Fitzsimmons, 62 N. Y. Supp. 1009, 29 Misc. Rep. 731, S. C. 61 N. Y. Supp. 485, 29 Misc. 204.

[20] 1901, Spencer v. De Witt C. Hay Library Ass'n, 73 N. Y. Supp. 712, 36 Misc. Rep. 393.

[1] 1907, Fralick v. Lyford, 95 N. Y. Supp. 433, 107 App. Div. 543, (Affirmed, 187 N. Y. 524, 79 N. E. 1105). It certainly was unfortunate that a rule was not laid down by which, under the Tilden act, a gift to an unincorporated body might be maintained where the intention of the testator to make a gift to religious uses is clear from the will and the surrounding circumstances, though no direct and specific words describing those uses are contained in the gift. 1916, **In re** Collier, 163 N. Y. Supp. 402, 404, 97 Misc. 543. (Affirmed 165 N. Y. Supp. 1081.)

[2] 1907, Catt v. Catt, 103 N. Y. Supp. 740, 744, 118 App. Div. 742; 1916, **In re** Crum, 164 N. Y. Supp. 149, 153, 98 Misc. 160.

[3] 1907, St. John v. Andrews Institute, 191 N. Y. 254, 278, 83 N. E. 981. (Affirmed 1909, Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. Ed. 892, 29 S. Ct. 601.)

[4] 1910, In re Seymour, 124 N. Y. Supp. 637, 67 Misc. Rep. 347.

[5] 1908, **In re** Shattuck, 193 N. Y. 446, 452, 454, 86 N. E. 455; 1901, Spencer v. De Witt C. Hay Library Ass'n, 73 N. Y. Supp. 712, 36 Misc. Rep. 393; 1905, Bowman v. Domestic and Foreign Missionary Society, 182 N. Y. 494, 75 N. E. 535; 1909, **In re** Beaver, 116 N. Y. Supp. 424, 62 Misc. Rep. 155; 1910, **In re** Powell, 121 N. Y. Supp. 779, 136 App. Div. 830; 1915, **In re** Spence, 151 N. Y. Supp. 292, 165 App. Div. 787; 1911, Starr v. Selleck, 130 N. Y. Supp. 693, 145 App. Div. 869. (Affirmed, 205 N. Y. 545, 98 N. E. 1116.)

benefited may be left to the trustee,[6] who need not be a corporation,[7] and whose non-existence,[8] incapacity,[9] or dissolution[10] is of no consequence. The **cy pres** doctrine, which had been inapplicable before the statute,[11] now became effective.[12] The word "grant," in the statute, was construed to include a power,[13] and the sentence "which shall in other respects be valid under the laws of this state" was held not to refer to perpetuities in general, but only to charities resting on more than two lives in being.[14]

§ 57. **Tilden Appreciation.** Looking back over the development of the forty years preceding the year 1893, it may well be said that while the doctrine, developed during this period, has been reared into a vast structure of learning, "it remains a monument of historical and academic worth rather than a guide needed for the disposition of present cases. It is a memorial and mortuary, more a shrine for meditation than a landmark for navigation. Upon the fabric of this erudition, statutory and judicial endeavor has wrought a modern system which, without assumption, may be declared so plain that the wayfaring man need not err therein."[15] In view of this development, it may well be contended that Tilden, through his invalid gift (saved in part to charity through a compromise), has done more for charity than he could have done by a will which would have withstood all the attacks made upon it. Had he clearly foreseen what was to follow after his death, he would, therefore, probably not have changed his will in the least. He intended to be a benefactor after his death, and he built better than he knew.

§ 58. **Michigan. Repeal of English Statutes.** When, by

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[6] 1898, Kelly v. Hoey, 55 N. Y. Supp. 94, 96, 35 App. Div. 273; 1907, Rothschild v. Wise, 92 N. Y. Supp. 1076, 103 App. Div. 235, 239; (modified, 188 N. Y. 327, 80 N. E. 1030); 1910, Manley v. Fiske, 124 N. Y. Supp. 149, 139 App. Div. 665. (Affirmed, 201 N. Y. 546, 95 N. E. 1133); 1914, Utica Trust and Deposit Co. v. Thompson, 149 N. Y. Supp. 392, 402, 87 Misc. Rep. 31.

[7] 1899, Allen v. Stevens, 161 N. Y. 122, 147, 148, 55 N. E. 568.

[8] 1912, Sawyer v. Dearstyne, 139 N. Y. Supp. 955.

[9] 1901, Matter of Griffin, 167 N. Y. 71, 60 N. E. 284.

[10] 1908, In re Deming, 112 N. Y. Supp. 170.

[11] 1906, Loch v. Mayer, 100 N. Y. Supp. 837, 840, 50 Misc. 442.

[12] 1916, In re MacDowell, 217 N. Y. 454, 465, 112 N. E. 177.

[13] 1896, Kelly v. Hoey, 55 N. Y. Supp. 94, 35 App. Div. 273.

[14] 1899, Allen v. Stevens, 161 N. Y. 122, 145, 55 N. E. 568.

[15] 1912, In re Davis Will, 137 N. Y. Supp. 427, 77 Misc. Rep. 72 (Affirmed, 141 N. Y. Supp. 1115, 156 App. Div. 911).

act of Congress in 1805, the territory of Indiana was divided and the territory of Michigan was created, the legal situation in regard to the statutes applicable to the new governmental subdivision was most difficult and involved. There were the acts of the British Parliament, the Canadian ordinances, the statutes of the Northwest Territory, and the laws of Indiana all claiming recognition, and all more or less entitled to it. The situation, bad enough as it was, was made intolerable by the frontier conditions which prevailed, and which made access to the proper books difficult, if not impossible. To remedy these defects, the legislative department of the new territory made short shrift of these laws by repealing them all, and by providing "that no act of the parliament of England, and no act of the parliament of Great Britain shall have any force within the territory of Michigan."[16] This action, of course, repealed among other statutes the statute of Elizabeth.[17]

§ 59. **Michigan. Copy of New York Act. Construction.** It will be noticed that this development bears a striking resemblance with the course of events in New York. Nor does the analogy stop with the repeal of the statute of Elizabeth. On the contrary, the state practically patterned its entire history in this matter on that of New York. In 1846, it copied the New York statute abolishing all uses and trusts except as expressly authorized and modified.[18] The question of the effect of this statute, however, did not arise until 1879, after both New York and Wisconsin, which in the meantime had copied the statute from Michigan, had definitely passed upon the question. It was almost a matter of course that the court should decide that trusts for charitable uses involving real estate were not distinguished from other trusts, and that their validity depended upon the same rules.[19]

§ 60. **Michigan. Personal Property Situation.** This left the question open whether a gift of personal property to charity was secure under the law of the state. Though a

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[16] 1, Territorial Laws of Michigan, 900.

[17] 1879, First Society M. E. Church of Newark v. Clark, 41 Mich. 730, 741, 3 N. W. 207; 1882, Hathaway v. New Baltimore, 48 Mich. 251, 254, 12 N. W. 186.

[18] Revised Statutes of Michigan, 1846, Chapter 63.

[19] 1879, First Society M. E. Church v. Clark, 41 Mich. 730, 741, 3 N. W. 207.

case arising in 1889 seemed to lean toward the affirmative of this proposition,[20] when the question finally was squarely presented, the court reluctantly held that such a gift is invalid on the ground that the repeal of the statute of Elizabeth had repealed the entire law of charities.[1]

§ 61. **Michigan. Return to English Charity Doctrine.** In 1906, a testatrix died leaving a legacy of $2,000 in trust for a charitable purpose. Nine months later, the legislature passed an act which was substantially a copy of the New York Tilden Act of 1893.[2] This act was held not to be retroactive when the case which had arisen out of the legacy mentioned finally reached the supreme court in 1910.[3] This decision, of course, left the statute in force so far as any prospective application of it is concerned. It was not until 1915 that its validity was attacked. The ground on which this attack was made was a purely technical one, involving merely the sufficiency of its title. An equal division of the court resulted in the affirmance of the judgment below which sustained the statute.[4] In consequence of this litigation, the legislature amended the title of the statute and broadened its language.[5] Beyond this, the Michigan court has not been called upon to either construe or apply the statute, though it has taken occasion to remark that the construction of the New York court will not be necessarily controlling, since the effect of a new statute upon the law and policy of a state depends upon the existing state of the law and the policies theretofore declared, and not upon the construction which fits it into the law of another state which may be radically different.[6] The importance of the statute in reversing a century-old policy of the state in regard to charitable trusts, however, has been recognized and given expression.[7] The

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[20] 1889, Penny v. Croul, 76 Mich. 471, 480, 43 N. W. 649, 5 L. R. A. 858.

[1] 1903, Hopkins v. Crossley, 132 Mich. 612, 96 N. W. 499. See 1910, Stoepel v. Satterthwaite, 162 Mich. 457, 127 N. W. 673.

[2] Public Acts of Michigan, 1907, No. 122, 4 How. Sta. (2nd Ed.), Section 10700.

[3] 1910, Stoepel v. Satterthwaite, supra.

[4] 1915, Loomis v. Mack, 183 Mich. 674, 150 N. W. 370.

[5] 1, Act 280, 1915. See 1917, In re Brown, 198 Mich. 544, 165 N. W. 929, 935.

[6] 1914, Moore v. O'Leary, 180 Mich. 261, 267-274, 146 N. W. 661, Ann. Cas. 1916, A. 373.

[7] 1915, Loomis v. Mack, 183 Mich. 674, 678, 150 N. W. 370.

state may, therefore, be regarded as back in line with the majority of states and has every reason to congratulate itself upon the action of its legislature.

§ 62. **Wisconsin. Adoption of New York Trust Statute.** Though Wisconsin was a part of Michigan when it became a separate territory in 1836, it was not a part thereof in 1810 when Michigan repealed all English statutes. Though the new territory thus was not affected by the action taken by Michigan in 1810, it was but natural for it not only to retain the bulk of the statutory law of Michigan, but also for a time closely to duplicate its new statutes. Accordingly, after Wisconsin had become a state, it adopted, in the revision of its statutes of 1849, the Michigan statute in regard to trusts which Michigan in turn had borrowed from New York.[8] Even before this time, as a territory, it had in 1839 declared that "none of the statutes of Great Britain shall be considered as law of this territory,"[9] which declaration, however, was limited by the court to statutes passed after the union of England and Scotland in 1707.[10]

§ 63. **Wisconsin. Adoption of New York Construction of Trust Statute.** When the first Wisconsin charity case reached the state supreme court in 1876, Chief Justice Dixon had shortly before resigned, and thereupon had been retained by the trustees of the charity, while Chief Justice Ryan, his successor, had been of counsel in the case and hence was disqualified to sit. Dixon correctly contended that the construction of the New York trust statute made by a lower court before the statute was copied by Wisconsin in 1849, and followed by the appellate court after such event, should control in Wisconsin as against the construction of this statute by the appellate court in its later cases. The court, however, overruled this contention, and held a devise of real estate to an unincorporated charitable society to be within the statute and hence void.[11]

§ 64. **Wisconsin. Exception made by Doctrine of Equitable Conversion.** Three years later, when another case came

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[8] Revised Statutes of Wisconsin, 1849, Chapter 57.

[9] See page 407, Laws of 1839.

[10] 1886, Webster v. Morris, 66 Wis. 366, 390, 28 N. W. 353, 57 Am. Rep. 278.

[11] 1876, Ruth v. Oberbrunner, 40 Wis. 238. For the New York cases referred to see Sections 47-51 supra.

before the court, Ryan was qualified to participate in the decision, and hence the gift was upheld though real estate was in fact involved. This result was accomplished without expressly overruling the previous case by applying the doctrine of equitable conversion, and thus changing the property from real into personal property.[12] The reasoning, however, was in striking contrast to that advanced in the previous case though the actual result was harmonious with it.

§ 65. **Wisconsin. Question of Definiteness of Beneficiaries.** These two cases naturally influenced greatly the development in the state for the next quarter century. The contrariety in the decisions during this period was largely due to the influence of the one or the other as it prevailed in actual cases. This is particularly true in regard to the question of the definiteness required in the donees of a charitable trust. As late as 1897, the court, in holding that a gift to the American Baptist Publication Society "to aid in the support of a Baptist colporteur and missionary in the state of Wisconsin" was void for indefiniteness, said: "Whether the colporteur or missionary should labor through the entire state, and sell or give away the religious books and publications; or whether they should expend their efforts among the colored or white population, or both; whether with the destitute or wealthy; and what publications they should distribute—are all matters left in doubt and uncertainty."[13] A few years later, however, the court upheld gifts for the aged and poor of a city,[14] and for the support, maintenance, education, or aid of such indigent orphan children under the age of fourteen years as to the executor may appear most needy and deserving.[15] The contrariety between these and similar cases give rise to the decision in **Harrington v. Pier,** in which Marshall, J., now deceased, said: "Indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee if there be a trust in fact, or indefiniteness in details of the particular purposes

[12] 1879, Dodge v. Williams, 46 Wis. 70, 50 N. W. 1103, 1 N. W. 92. See also 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 53 (N. Y.); 1834, Theological Seminary v. Childs, 4 Paige 419 (N. Y.); 1844, Hornbeck v. American Bible Society, 2 Sandf. Ch. 133 (N. Y.).

[13] 1890, Will of Fuller, 75 Wis. 431, 437, 36 N. W. 407.

[14] 1897, Beurhaus v. Cole, 94 Wis. 617, 630, 69 N. W. 986.

[15] 1897, Sawtelle v. Witham, 94 Wis. 412, 69 N. W. 72.

declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses."[16]

§ 66. **Return of Wisconsin to English Charity Rule.** The task of making real property in the technical sense subject to the charity rule, however, still remained to be accomplished. In the earliest case on the subject, the court had held that the doctrine of perpetuities, so far as it refers to the length of time for which a piece of property is held, is applicable to property deeded or devised to a charitable purpose.[17] To this extraordinary doctrine, the legislature at once reacted by amending the perpetuity statute so as to allow grants or devises in perpetuity to literary or charitable corporations.[18] This, of course, was not going far enough. Chief Justice Ryan, therefore, in 1879 limited the doctrine to real estate, and stated that the statute abolished the English doctrine as applicable to personalty.[19] Thus, the law remained, withstanding all attempts to change it by judicial decisions. Finally, Marshall, J., having failed in his attempts to induce his colleagues to declare that real estate given to a charitable purpose is exempt from the perpetuity rule, in 1904 appealed to the legislature to remedy the situation, and to banish the specter of the New York heresy from the state's judicial tables.[20] In consequence, in 1905, the perpetuity statute was amended[21] by exempting from its provisions real estate "given, granted, or devised to a charitable use." By this process a full reintrenchment of the common law doctrine of charitable trusts has been effected in the state.[22]

§ 66a. **Cross Currents in Wisconsin.** The above paragraphs were written before the recent decision of the Wisconsin court in **Tharp v. Smith.**[23] This case, Eschweiler, J., dissenting, holds that a bequest to a designated trustee for

[16] 105 Wis. 485, 514, 76 Am. St. Rep. 924, 50 L. R. A. 307, 82 N. W. 345.

[17] 1876, Ruth v. Oberbrunner, 40 Wis. 238.

[18] Revised Statutes 1878, Section 2039.

[19] 1879, Dodge v. Williams, 46 Wis. 70, 96.

[20] 1904, Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258.

[21] Section 2039, Wisconsin Statutes.

[22] For a complete review in detail of this development, see an article by the author of this book published in 1 Wisconsin Law Review 129 (1921).

[23] 195 N. W. 331. See 1899, Keith v. Scales, 124 N. C. 497, 32 S. E. 809.

the benefit of the Seventh Day Adventist Church, to be used principally for the publication and distribution of tracts and literature teaching its doctrine, is void for indefiniteness, because the particular branch of the Seventh Day Adventist Church intended to be benefited was not sufficiently designated. The court cites in support of its decision two cases which had been overruled by Marshall, J., in **Pier v. Harrington,**[1] and to cap the climax erroneously cites **Pier v. Harrington** for the same purpose. Just what role this decision will play remains to be seen. It would appear that the court has completely reversed its holdings for the last twenty-five years, and has gone back to the erroneous conception with which it started out in 1876.[2] It is to be hoped that the legislature will soon take the necessary action.

§ 67. **Minnesota. Adoption of New York Statute. Effect.** When the territory of Minnesota was created in 1849, it was provided by Congress that "the laws in force in the territory of Wisconsin, at the date of the admission of the state of Wisconsin, shall continue to be valid and operative therein,"[3] subject, of course, to be altered or repealed by the legislative body of the new territory. The new territory, when it undertook in 1851 to establish its own code, retained from the Wisconsin statutes the act which abolished all uses and trusts except as expressly authorized and modified.[4] Under this statute, a deed in the Methodist Episcopal form was held void in 1883, Michigan and New York decisions being relied upon.[5] When the question came up again in 1897, the court stated that it was well settled in the states from which the statute was derived that the English law of charity had been abolished by it. Reliance was placed upon New York, Michi-

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[1] 105 Wis. 485, 76 Am. St. Rep. 924, 50 L. R. A. 307, 82 N. W. 345. The two cases which had been overruled in this case were 1890, Will of Fuller, 75 Wis. 431, 44 N. W. 304; 1876, Heiss v. Murphey, 40 Wis. 276.

[2] See for a somewhat more extensive discussion of this entire matter an article by the author in the March, 1924, number of the Marquette Law Review, entitled "Cross Currents in the Wisconsin Charity Doctrine." For states in which the legislature has acted see Sections 37, 41, 43, 55, 61, 68, 75, 76, 81, 82, 85, 88 of this book.

[3] Section 12 of the act establishing the territorial government of Minnesota, approved March 3, 1849.

[4] Statutes of Minnesota, 1851, Chapter 44. See 1904, Watkins v. Bigelow, 93 Minn. 210, 221, 100 N. W. 1104.

[5] 1883, Little v. Williford, 31 Minn. 173, 176, 17 N. W. 282.

gan and Wisconsin cases, and a gift to trustees for an unincorporated branch of the Salvation Army located in St. Paul was declared void.[6]

§ 68. **Minnesota. Personal Property.** The Minnesota decisions so far noted referred to real estate. In 1903, a case arising out of a gift of personal property came before the court. The legislature, in 1875, for some unfathomed reason, had included "money, stocks, bonds, or valuable chattels of any kind" in the provisions of the trust statute.[7] The court accordingly held that a charitable gift of personal property was covered by the statute, and that the bequest was void.[8] This decision was rendered on January 9, 1903. By an act approved on April 4, 1903, the legislature attempted to re-establish charitable trusts in the state.[9] Unfortunately, however, it adopted a title which was too restrictive and made the statute unconstitutional.[10] Finally, by the adoption of the revision of 1905,[11] a certain leeway was again given to charitable gifts so far as personal property is concerned.[12] Thus, the subject of charitable trusts has, to an extraordinary degree, been the football of legislative whims in the gopher state. A program of constructive legislation is needed to eliminate the uncertainties under which the law of the state is laboring.

§ 69. **Third Group of Minority States.** The rule adopted by the two classes of states so far considered may appear narrow and contracted. However, by comparison with the third class, consisting fortunately of only one state, it is quite liberal. Charitable gifts by will to corporations in existence at the time, or to be organized within the period fixed by the statute against perpetuities, are permitted by the rule in force in both these classes. It has remained for a southern state to establish a doctrine which holds even such testamentary gifts to be void.

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[6] 1897, Lane v. Eaton, 69 Minn. 141, 143, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559.

[7] Chapter 53, Laws of 1875; 1903, Shanahan v. Kelly, 88 Minn. 202, 210, 92 N. W. 948.

[8] 1903, Shanahan v. Kelly, 88 Minn. 202, 211, 92 N. W. 948.

[9] Chapter 132, General Laws of Minnesota of 1903.

[10] 1904, Watkins v. Bigelow, 93 Minn. 210, 224, 100 N. W. 1104.

[11] Section 3249 (5); 1913, Young Men's Christian Ass'n v. Horn, 120 Minn. 404, 410, 139 N. W. 805.

[12] 1913, Young Men's Christian Ass'n v. Horn, 120 Minn. 404, 418, 139 N. W. 805.

§ 70. **Mississippi Constitution.** The state of Mississippi, admitted into the Union in 1817, adopted not less than four constitutions within the first seventy-five years of its existence. After testamentary gifts for the emancipation of slaves had been upheld under the second constitution adopted in 1832,[13] after a deed in the Methodist Episcopal form had been upheld under the third constitution adopted in 1868,[14] the state, not yet satisfied with its fundamental law, adopted its fourth constitution in 1890. In this constitution all testamentary gifts of real estate, or money raised by the sale of real estate for charitable purposes,[15] and every testamentary gift of personal property given to "any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination or association," either for its own purposes or in trust for general charity,[16] were declared void. These provisions were taken from the code of the state of 1857,[17] had been omitted from the revised code of 1880, but despite this fact were now given recognition as part of the fundamental law of the state.[18] Whether or not they can be harmonized with each other is doubtful. The Mississippi Supreme Court has striven in vain for some principle on which to accomplish this result, and has been constrained to recognize the fact that the subjects of the two sections are controlled by divergent words too clear to admit of the same construction.[19]

§ 71. **Construction of Mississippi Constitution.** While the exact meaning of certain terms in these provisions is obscure, their general purpose is clear. "Manifestly, the purpose of the constitution is to prevent one who will not be charitable at his own expense from being so at the expense of his heirs at law. One may yet 'sell that he hath and give to the poor,' but he may not keep his grip on his estate until death relaxes his grasp, and then, at the expense of wife and

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[13] 1846, Wade v. American Colonization Society, 15 Miss. 663, 45 Am. Dec. 324; 1856, Lusk v. Lewis, 32 Miss. 297; 1858, Lewis v. Lusk, 35 Miss. 401.

[14] 1875, Kilpatrick v. Graves, 51 Miss. 432.

[15] Section 269, Mississippi Constitution of 1890.

[16] Section 270, Mississippi Constitution of 1890.

[17] Revised Code of Mississippi, 1857, Chapter 35, Sections 55 and 56.

[18] 1895, Blackbourn v. Tucker, 72 Miss. 735, 749, 17 So. 737.

[19] 1895, Blackbourn v. Tucker, supra.

child, devote it to religious uses."[20] Nor is a will made before the adoption of the constitution exempt from its provision where the testator has died after that time.[21] In view of this situation, the question whether English statutes are in force in Mississippi is now a purely academic one so far as our present inquiry is concerned.[1]

§ 72. **Probable Reason for Mississippi Constitutional Provision.** The policy of these provisions is unique, and may some day be greatly lamented when it will be too late to save the gift which may bring the matter to the attention of the public. What hidden influence has put them into the statutes of 1857, and into the constitution of 1890 does not appear. It is possible that the fear that charities may be devoted largely to the uplift of the black race is at the bottom of them. If this is the reason, the repeal of the statute in 1880 was certainly a progressive move. By parity of reasoning, its incorporation into the fundamental law of the state in 1890 was a long step backward. It is to be hoped that these provisions will eventually be eliminated from the law of Mississippi.

§ 73. **Four Classes in Majority Group.** Of the eight states so far considered, three, namely, New York, Michigan and Wisconsin, have quite fully extricated themselves from the toils of the narrow minority doctrine which at one time enmeshed them, while Virginia, West Virginia, Maryland and Minnesota have only very partially escaped, and Mississippi has a status which is all her own. There can be no question, therefore, that the English rule adopted by the great majority of the states is in the ascendancy. While the general results in these states are quite uniform, there is no homogeneity in their development. There are four distinct classes: 1. States in which extensive statutes have been enacted covering the matter. 2. States in which the common law, as well as English statutes passed before the first settlement in America, have been adopted by the legislature. 3. States which simply adopt the common law without mentioning any statute.

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[20] 1895, Blackbourn v. Tucker, 72 Miss. 735, 747, 17 So. 737.

[21] 1895, Blackbourn v. Tucker, supra.

[1] 1846, Sessions v. Doe, 15 Miss. (7 Smedes and Marshall), 130, 161.

4. States in which the law-making power has ignored the matter entirely.

§ 74. **First Class of Majority Group.** It has been seen that the immediate reason for the change of policy in New York, Michigan and Wisconsin have been cases decided or pending in the courts of those states. A similar reason can, with more or less clearness, be discerned for the enactment of the various statutes by which the subject has been placed beyond the range of dispute in the other states which, together with New York, Michigan and Wisconsin, now form the first class of the majority group as above outlined. Even the very statute of Elizabeth rested on such a reason. The tracing of these reasons is interesting, and takes the inquirer in some instances back to the very foundation of the American colonies.

§ 75. **Connecticut.** The first of the American colonies to legislate on the subject was Connecticut. By an "ancient statute"[2] passed in 1684, but not put in print until 1702, and hence generally called the "statute of 1702,"[3] all estates that had been or would be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, were confirmed to remain to the uses to which they had been or should be granted according to the true intent and meaning of the grantor, and to no other use whatever. This statute is still in force,[4] and is important "as it declares the fixed purpose of the state to preserve estates for charitable uses in accordance with the intent of the grantor."[5] Though it refers only to grants, and does not mention testamentary gifts, it has been declared to be a virtual reënactment of the statute of Elizabeth,[6] and to contain more liberal and comprehensive provisions to sustain devises than that statute.[7] Under such construction, it is clear that the policy of the state is removed from the domain of doubt, the statute containing "an unmistakable statutory declaration as to the permanent and abiding character of the devotion to the char-

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[2] 1835, Chatham v. Brainerd, 11 Conn. 60, 90.

[3] 1876, Adye v. Smith, 44 Conn. 60, 69, 70, 26 Am. Rep. 424.

[4] Section 4024, General Statutes of Connecticut, 1902.

[5] 1899, Duggan v. Slocum, 92 Fed. 806, 807, 34 C. C. A. 676.

[6] 1845, American Bible Society v. Wetmore, 17 Conn. 181, 187, 189.

[7] 1871, White v. Howard, 38 Conn. 342, 362.

itable use which attaches to gifts intended for such use by the donor."[8]

§ 76. **Rhode Island. Early Statute.** After Portsmouth and Newport, the two competing portions of Rhode Island founded in 1638, had united under a voluntary agreement in 1640, had received a patent in 1643, had disunited in 1651, and reunited in 1654, one John Clark, in 1663, procured a royal charter for the strife-ridden colony which served its pugnacious people as a constitution until 1842, when the tragedy of Dorr's rebellion made a new constitution imperatively necessary. Clark died in 1676, leaving what is probably the first charitable testamentary gift in America. In 1721, serious abuses in connection with this trust had come to the notice of the public. Accordingly, the colonial legislature in 1721 passed a statute whose preamble was almost literally copied from the statute of Elizabeth, omitting only its long enumeration of charitable uses, and substituting therefor the two uses raised under the will of Clark "for the relief of the poor, and the bringing up of children to learning." The remedy, of course, was different from that provided for by the statute of Elizabeth, ending in an appeal to the governor and council who were to pass judgment as they thought fit and agreeable to equity and good conscience according to the true intent and meaning of the donor.[9]

§ 77. **Rhode Island. Subsequent Amendment.** Though it was clear that the short enumeration in this statute was not intended to be exclusive, its shortness and generality, unlike that of the statute of Elizabeth precluding any such construction,[10] the legislature, out of great caution, in 1844 amended it by adding to the purposes enumerated the words "or for any other specific purpose,"[11] thus removing any doubt as to the comprehensiveness of the legislative purpose which now stood as coextensive with that of the statute of Elizabeth. In this form the statute reappeared in the revision of 1857,[12] but thereafter disappeared from the statute book, having probably served its immediate purpose. But,

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[8] 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 315, 82 Atl. 582.

[9] 1856, Derby v. Derby, 4 R. I. 414, 437-439.

[10] 1862, Potter v. Thornton, 7 R. I. 252, 283.

[11] Revised Public Laws of Rhode Island, 1844, page 298.

[12] Chapter 55, 1862, Potter v. Thornton, 7 R. I. 252, 264.

though its body has shared the fate of a multitude of other statutes, its spirit lives in the decisions of the Rhode Island court rendered under as well as independently of it.[13]

§ 78. **North Carolina.** After North Carolina, during the revolutionary war, had separated from England, its legislature in 1778 declared that all statutes and parts of the common law, which had heretofore been in use and were not inconsistent with the independence of the state, continued in full force.[14] Whether or not this declaration adopts the statute of Elizabeth, the court has taken jurisdiction over charitable trusts by virtue of its ordinary jurisdiction. Not satisfied, however, with this situation, the legislature in 1831[15] and 1832[16] conferred express jurisdiction over charities on the courts[17] by passing a statute providing that if property, real or personal, was granted by deed, will, or otherwise "for such charitable purposes as are allowed by law," a yearly account was to be made to the clerk of the superior court of the county, and that if this provision was not complied with, action should be begun by the attorney general. This statute is still in force,[18] puts the position of the state beyond doubt, and supersedes the statute of Elizabeth though adopting its enumeration as to what uses are to be considered as charitable.[19]

§ 79. **Kentucky. Early History.** When, shortly before the adoption of the Federal constitution, the population of what is now Kentucky, but what was then a part of Virginia, rapidly increased, a demand for separate state existence was persistently advanced by the hardy settlers who had gone to the new country in boatloads and was granted by Virginia in 1789 and by Congress in 1791. It has been seen that Virginia had in 1776 adopted all English statutes made prior to the fourth year of James I, which were of a general nature and not repugnant to the new situation.[20] On

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[13] 1884, Rhode Island Hospital Trust Co. v. Olney, 14 R. I. 449, 452; 1884, Pell v. Mercer, 14 R. I. 412.

[14] 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 233; Iredell's Statutes of North Carolina, Chapter 5, page 353; 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 132, 9 Am. Dec. 619.

[15] Chapter 25, Section 5, Session Laws of North Carolina.

[16] Chapter 14, Sections 2, 3, 4.

[17] 1841, State v. McGowen, 37 N. C. (2 Ired. Eq.) 9, 16.

[18] Sections 3922, 3923, 3924, Revised Statutes of North Carolina, 1908.

[19] 1842, State v. Gerard, 37 N. C. (2 Ired. Eq.) 210, 219, 220.

[20] See Section 35, **supra.**

April 19, 1792, a few months before the statute just mentioned was repealed by Virginia, Kentucky adopted its first constitution which provided that "all laws now in force in the state of Virginia, not inconsistent with this constitution, which are of a general nature, and not local to the eastern part of that state, shall be in force in this state, until they shall be altered or repealed by the legislature."[21] Since the statute of Elizabeth is not so peculiar or local in its character as to exclude it from adoption under this provision,[1] the new state, by implication, adopted the statute and made it a part of its jurisprudence.[2]

§ 80. **Kentucky. Later Development.** Not satisfied, however, with this situation, and with the evident purpose of preventing the accumulation in the hands of the churches of large landed estates,[3] and to curb the acquisitiveness of eleemosynary corporations operating under the guise of charities,[4] the legislature, in 1852, constructively abolished the statute, but at once in "American phase"[5] reënacted it, adopting substantially its enumeration of charitable purposes, but amplifying this list by adding to it the words "any other charitable or humane purpose." In addition, it was expressly provided that no charity should be defeated by the want of a trustee, and that churches be limited to fifty acres of land.[6] What is intended by the "American phase" was made clear by an amendment passed in 1893, which provided that the instrument creating a charitable trust must point out, "with reasonable certainty, the purpose of the charity and the beneficiaries thereof."[7]

§ 81. **Kentucky Statute. Construction.** This statute is

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[21] Section 6, Article 8, Kentucky Constitution of 1792.

[1] 1834, Gass v. Wilhite, 32 Ky. (2 Dana.) 170, 177, 26 Am. Dec. 446.

[2] 1836, Moore v. Moore, 34 Ky. (4 Dana.) 354, 362, 29 Am. Dec. 417. See 1839, Lathrop v. Commercial Bank, 38 Ky. (8 Dana.) 114, 121, 33 Am. Dec. 481; 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 617.

[3] 1888, Kinney v. Kinney, 86 Ky. 610, 612, 6 S. W. 593, 9 Ky. Law Rep. 753.

[4] 1923, State Bank and Trust Co. v. Patridge, —— Ky. ——, 248 S. W. 1056.

[5] 1867, Cromie v. Louisville Orphan's Home Society, 66 Ky. (3 Bush.) 365, 374; 1902, Coleman v. O'Leary, 114 Ky. 388, 413, 70 S. W. 1068, 24 Ky. Law Rep. 1248.

[6] Revised Statutes, 1852, page 170.

[7] Section 317 Ky. Sta. The entire statute is still in force. Sections 317 to 319 Carroll's Kentucky Statutes of 1915; 1899, Crawford v. Thomas, 114 Ky. 484, 491, 54 S. W. 197, 55 S. W. 12, 21 Ky. Law. Rep. 1100, 1178.

a conservative enactment. It does not put charitable uses upon the same plane as private trusts. It does not make them void as perpetuities. It does not require them to be as definite as private trusts. But, it does require a reasonable certainty, and thus cuts off the outgrowth of the English statute caused by the royal prerogative under which a mere intimation that the testator had some sort of charitable design is sufficient to bring the power of the court into action to devise a scheme to effectuate such design.[8]

§ 82. **Georgia.** The supreme court of Georgia, in 1848, declared that the statute of Elizabeth and its construction had been brought over from England by the colonists, and that its principles were applicable to the colony, though its forms and proceedings were not adopted.[9] In 1858, the same court held that a gift "for poor orphan children" of a certain county was void on account of the uncertainty of its beneficiaries.[10] This decision was based on the leading Maryland cases on charitable trusts,[11] the court overlooking or disregarding both its former decision and the fact that Maryland had adopted a rule which barred all application of the English charity doctrine. The tendency of the court, thus exhibited to adopt the Maryland rule, quickly received the proper legislative check. The code of Georgia of 1861 contained a chapter in which charities were defined by enumeration, their **cy pres** application was provided for, and it was declared that equity "has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, where the same are definite and specific in their objects and capable of being executed."[12] When a construction of this statute was asked in 1872, the court entered fully into its spirit, refused to hold that the requirement, that such bequest must be definite and specific in its object, called for the same amount of certainty necessary in private trusts, and held that it was inserted merely to keep out such indefinite trusts as

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[8] 1902, Coleman v. O'Leary, 114 Ky. 388, 413, 70 S. W. 1068, 24 Ky. Law. Rep. 1248.

[9] 1848, Beall v. Fox, 4 Ga. 404, 422.

[10] 1858, Beall v. Drane, 25 Ga. 430.

[11] 1822, Dashiell v. Attorney General, 5 Har. and J. 392, 9 Am. Dec. 572 (Md.).

[12] Code of Georgia, 1861, page 568. This statute is still in force. Park's Annotated Code of Georgia, Sections 4603 to 4608.

were administered under the royal prerogative.[13] The English law of charities has thus been fully adopted in Georgia "as far as is compatible with a free government where no royal prerogative is exercised."[14]

§ 83. **Louisiana. Civil Law Situation.** When Louisiana became a state in 1812, its constitution harmonized the old civil law in force during the Spanish and French dominion with the principles of the common law and with republican institutions, and as thus harmonized continued this law in force. In consequence, both the written and unwritten law of the state has a flavor which is exotic to common law lawyers. This is true particularly in regard to the legal doctrines applicable to trust relations and life estates. These, known to the civil law respectively as **fidei commissa** and **substitutions,**[15] were, by the code of 1818, prohibited, so that "every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir, or the legatee."[16] This prohibition was established in the interest of public order and state policy, and embraces within its scope the trust estates of the common law.[17] Its object is "to prevent property from being tied up for a length of time in the hands of individuals, and placed out of the reach of commerce."[18] It prevents a testator from fettering the dominion of the almoner of his bounty over property given by him, and thus complicate the simple tenures which alone are permissible in Louisiana.[19] Hence, a testator cannot confer discretion on his executors to select

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[13] 1872, Newson v. Starke, 46 Ga. 88.

[14] 1882, Jones v. Habersham, 107 U. S. 174, 180, 27 L. Ed. 401, 2 S. Ct. Rep. 336.

[15] 1899, Succession of Meunier, 52 La. Ann. 79, 85, 26 So. 776, 48 L. R. A. 77.

[16] Article 1507 (1520 in the civil code of 1913).

[17] 1899, Succession of Meunier, 52 La. Ann. 79, 83, 26 So. 776, 48 L. R. A. 77.

[18] 1827, Mathurin v. Livaudais, 5 Mart (N. S.) 301 (La.). Cited 1913, Succession of Villa, 132 La. 714, 719, 61 So. 765. The latter case holds that a bequest to a minister to be used for the benefit of a certain church is valid as not creating a trust in the common law sense, but merely putting the title temporarily in the hands of the minister for a charity.

[19] 1857, Society for Relief of Destitute Orphan Boys v. New Orleans, 12 La. Ann. 62, 67; 1889, Succession of Kernan, 52 La. Ann. 48, 26 So. 749.

the class[20] or institution[1] to be benefited by his gift, nor can he give Louisiana real estate to trustees to build a college in another state.[2] Provisions, which in common law states would be construed as creating trusts, will, however, in Louisiana be construed as mere directions,[3] so that a devise to an incorporated Masonic lodge "desiring and requesting" that it be used "for the support and education of necessitous widows and orphans of deceased Masons" creates a valid charity.[4] Very little of the "curious learning" of the chancery courts of common law states, therefore, had any application to Louisiana.[5]

§ 84. **Louisiana. Ratification by Public Authorities.** While trusts in both the common and civil law sense were abolished by this statute, charities did not go to the wall.[6] Under the civil law conception, a charity is considered as a gift to the public, with an implied condition that it will be accepted by the public authorities. Says the court: "When a testator is desirous of becoming the founder of a charitable or educational institution, he does so on the implied condition that the state will ratify and confirm his benevolent intentions. If the confirmation is withheld, the will is defeated; but if granted, it operates like the accomplishment of all suspensive conditions, whether express or implied, and has a retroactive effect."[7] This ratification or confirmation may, and usually is made in advance by conferring the power to take such a gift on a municipality or a private charitable corporation. Says the Louisiana Code: "Donations made for the benefit of a hospital, of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments."[8] Under this article the city of New Orleans has been held to

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[20] 1899, Succession of Burke, 51 La. Ann. 538, 25 So. 387; 1900, Succession of McCloskey, 52 La. Ann. 1122, 27 So. 705.

[1] 1891, New Orleans v. Hardie, 43 La. Ann. 251, 9 So. 12.

[2] 1852, Succession of Franklin, 7 La. Ann. 395.

[3] 1899, Succession of Meunier, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77.

[4] 1886, Williams v. Western Star Masonic Lodge, 38 La. Ann. 620.

[5] 1857, Fink v. Fink, 12 La. Ann. 301, 321.

[6] 1841, Milne v. Milne, 17 La. 46, 57.

[7] 1852, Succession of Franklin, 7 La. Ann. 395, 431. (Dissenting opinion by Preston, J.)

[8] Article 1549, Civil Code of Louisiana.

be competent to claim and receive a legacy "aux orphelins aux de la Primiére Municipalite."[9] The same has been held in regard to an incorporated society for the relief of destitute orphan boys.[10] This ratification may be made **ex post facto** by creating the corporation contemplated by the testator. Under this rule a gift direct to a very indefinite class of beneficiaries may be upheld in the state. "It is no objection to the validity of a legacy to pious uses, that it is for the benefit of the poor, even without any designation of locality."[11] Gifts for dowries of young ladies of certain parishes to encourage their marriages have, therefore, been recognized by the legislature in 1837.[12]

§ 85. **Statutory Approach in Louisiana to English Doctrine.** In 1882, the legislature instituted a marked departure from the beaten path so far followed in the state by exempting charitable gifts **to trustees** for educational, literary, or charitable purposes, or for the benefit of educational, literary, or charitable institutions already established, or to be founded from the operation of the laws of the state relative to **fidei commissa.**[13] "This departure from, or rather modification of, the ancient policy of the law was coincident with the munificent dispositions made, or then about to be made, by the venerable and philanthropic Paul Tulane, for the laudable purpose of founding in the city of New Orleans, where his active life had been spent and his fortune amassed, a great university, which, bearing his name, stands to-day alike a justification of the aforesaid modification of the law of trusts, a monument to his memory, and a blessing to mankind.[14] This statute brings the law of Louisiana into substantial accord with that of other states, though minor differences

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[9] 1842, Succession of Mary, 2 Rob. 438, 440. (La.)

[10] 1857, Society for Relief of Destitute Orphan Boys v. New Orleans, 12 La. Ann. 62, 66.

[11] 1853, State v. McDonogh, 8 La. Ann. 171. Cited 1887, Succession of Auch, 39 La. Ann. 1043, 1045, 3 So. 227.

[12] 1841, Milne v. Milne, 17 La. 46, 55.

[13] Act No. 124, Acts of 1882; 1899, Succession of Burke, 51 La. Ann. 538, 541, 25 So. 387.

[14] 1899, Succession of Meunier, 52 La. Ann. 79, 84, 26 So. 776, 48 L. R. A. 77. The statute is limited to the boundaries of the state and does not refer to donations made for purposes outside of it. That a legatee is a religious corporation, and as such a charitable institution, brings the case within the statute; 1915, Succession of Percival, 137 La. 203, 208, 68 So. 409.

still exist, and though the statute has occasionally been overlooked.[15]

§ 86. **Pennsylvania. Early History.** When William Penn, in 1681, received the charter of the colony which bears his name, the conditions in the infant frontier community were primitive in the extreme. The lives of its early settlers were marked by a severe simplicity which enabled them to do without many institutions which are now absolutely indispensable. While charities of the educational and eleemosynary kind were few and far between, pious and religious uses soon became correspondingly frequent. Valuable bequests were made to such uses by men ignorant of the niceties of expression necessary to accomplish their object at the common law. These, by one means or another, were uniformly upheld, resulting in a usage which eventually received the sanction of law, resting as it did "on the basis of all our laws of domestic origin—the legislation of common consent."[16]

§ 87. **Pennsylvania. Early Statute.** Recognizing this state of facts, the colonial legislature, as early as 1730, passed an act ratifying and confirming gifts "to any person or persons, in trust, for sites of churches, houses of religious worship, schools, almshouses and for burying grounds, or for any of them," and declared that such gifts should be "for the sole use, benefit and behoof of the said respective societies, who have been in the peaceable possession of the same for the space of twenty-one years."[17] While the statute of Elizabeth was repeatedly held not to be in force in the state,[18] because its peculiar machinery was wholly inapplicable to its institutions,[19] its conservative provisions,[20] consisting of the principles applied by the chancery courts in England were recognized by common usage and constitutional provision,[1] and were useful as an aid in defining a charity.[2]

[15] 1914, Succession of Reilly, 136 La. 347, 367, 67 So. 27.

[16] 1827, Witman v. Lex, 17 Serg. and R. 88, 92, 17 Am. Dec. 644 (Pa.).

[17] 1 Sm. L. 192, Section 2. 1 Pars. Eq. Cas. 98, 108, 1 Clark

[18] 1844, Thomas v. Ellmaker, 1 Pars. Eq. Cas. 98, 108, 1 Clark 502 (Pa.); 1827, Witman v. Lex, 17 S. and R. 88, 91, 17 Am. Dec. 644 (Pa.). See 1844, Vidal v. Girard, 43 U. S. 127, 192, 11 L. Ed. 205, citing Pennsylvania cases.

[19] 1850, In re Pepper, 1 Pars. Eq. Cas. 436, 450 (Pa.).

[20] 1857, Price v. Maxwell, 28 Pa. (4 Casey) 23, 35.

[1] 1876, Bethlehem Borough v. Perseverance Fire Co., 81 Pa. (31 P. F. Smith) 445, 457; 1843, Zimmerman v. Anders, 6 Watts and S. 218, 220, 221, 40 Am. Dec. 552 (Pa.).

[2] 1915, Kimberly's Estate, 249 Pa. 483, 487, 488, 95 Atl. 86.

§ 88. **Pennsylvania Statute of 1855.** In 1855, the legislature of the state launched upon a policy of extensive statutory regulation. Foreign corporations and foreign governments, potentates and powers were forbidden to acquire any real estate in the state unless specifically authorized by statute. The attestation of two creditable and disinterested witnesses was required to a deed or will creating a charity, and such document was required to be executed at least one month before the donor's death. The annual income of unincorporated charitable societies and accumulations of interest in their behalf were limited, provision was made in regard to the manner in which such amounts were to be ascertained, and the auditor general of the state was given authority to ascertain the facts in any particular case. Property held in contravention of the statute was to escheat to the state to be applied by the legislature "to objects within the purpose of the trust thereof, should such object arise, or to other objects as near as practicable to the intent of such trust."[3]

§ 89. **Amendment of Pennsylvania Statute of 1855.** These provisions have since been extensively amended. In 1876, it was provided that if the beneficiaries of a charitable trust should become extinct, and there should be no heirs to claim the property, the trustees might make application to the courts for directions as to a **cy pres** application of it which the court was given power to grant.[4] In 1885, it was enacted that property covered by a void charitable trust should pass to the heirs or next of kin as if no will had been made.[5] This statute proved a source of trouble. Consequently, it was provided in 1889 that no charitable trust should fail for the want of a trustee, or because its object had ceased or depended upon the discretion of the last trustee, or was given in perpetuity or in excess of the annual value limited by law, but that the court should supply the trustee and carry out the donor's intent consistent with law and equity so far as it could be ascertained.[6] In the same

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[3] Laws of Pennsylvania, 1855, No. 347, page 328.

[4] Laws of Pennsylvania, 1876, No. 205, page 211.

[5] Laws of Pennsylvania, 1885, No. 184, page 259.

[6] Laws of Pennsylvania, 1889, No. 193, page 173.

year the clear yearly value of real estate which charitable associations were authorized to hold was fixed at $30,000,[7] and four years later machinery was provided through which such amount could be increased.[8] In 1895, the legislation of 1889 in regard to the **cy pres** doctrine was supplemented, and the respective jurisdiction of the courts and of the legislature was fixed and determined.[9] Finally, a disinterested witness within the meaning of the mortmain provisions of this legislation was defined in 1911.[10]

§ 90. **Pennsylvania. Results of Statutory Policy.** The two principal results obtained by this legislation relate to mortmain limitations placed upon donors, and to the **cy pres** doctrine. These two results are interdependent. Safeguards are thrown around the action of donors by the mortmain provisions with a view to prevent any undue action on their part. Where, however, a charity is once created, it is protected henceforth from the designs of the heirs by an extended application of the **cy pres** doctrine. Unless, therefore, an express reverter condition is attached, and the facts on which the condition is to become effective have happened,[11] property given to charity will retain the indelible stamp of the trust,[12] whether it is personalty or real estate,[13] and cannot be reclaimed by the heirs.[14] Where its immediate object has failed, the recommendations of the contributors are not absolutely controlling on the court, though entitled to respect and weight.[15] A direction that certain property is to be "appropriated to foreign missionary work" has, therefore, been carried out under this statute,[16] and a gift to a Pauline Temporary Home has been applied to a children's aid society.[17] Thus a **cy pres** doctrine has been developed which

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[7] Laws of Pennsylvania, 1889, No. 40, page 42.

[8] Laws of Pennsylvania, 1893, No. 260, page 324.

[9] Laws of Pennsylvania, 1895, No. 89, page 114; 1901, Stevens Estate, 200 Pa. 318, 322, 49 Atl. 985.

[10] Laws of Pennsylvania of 1911, page 702.

[11] 1889, Seitz v. Seitz, 1 Monag. 626, 17 Atl. 229 (Pa.).

[12] 1889, Jones v. Renshaw, 130 Pa. 327, 18 Atl. 651.

[13] 1895, **In re** Cowan, 4 Pa. Dist. Rep. 435.

[14] 1884, Appeal of Curran, 4 Pa. S. Ct. Rep. (4 Penny.) 331 (affirming, 15 Phila. 84).

[15] 1891, Attorney General v. Pauline Temporary Home, 141 Pa. 537, 21 Atl. 661.

[16] 1892, Presbyterian Board of Foreign Missions v. Culp, 151 Pa. 467, 25 Atl. 117.

[17] 1891, Attorney General v. Pauline Temporary Home, 141 Pa. 537, 21 Atl. 661.

approximates the English doctrine, and certainly goes far beyond the doctrine recognized in any other state.

§ 91. **Second Class of Majority Group.** When the break between England and the thirteen colonies occurred in 1776, the question of the effect of the declaration of independence on the statutory and common law of England, which had heretofore prevailed in America, at once presented itself for consideration, and was indeed a matter of the gravest importance. None of the colonies had anything like a code of its own. The necessity of adopting the written and unwritten law of England in whole or part was obvious. Accordingly, the matter was attended to by provisions inserted in the constitutions of Maryland in 1776,[18] of New York in 1777,[19] of Massachusetts in 1780,[20] and by a statute passed by North Carolina in 1778,[1] and by Virginia in 1776,[2] which Virginia statute was incorporated into the Kentucky constitution by reference when this daughter of the old dominion state assumed statehood in 1792.[3] These provisions, while widely differing in form, substantially agreed in adopting all English statutes made in aid of or to supply the defects of the common law enacted prior to the fourth year of James I (the time of the first settlement of Virginia in 1606), and which in addition were of a general nature and not local to that kingdom and consistent with the new situation in America. While these provisions were later nullified in New York, Virginia and Maryland, and superseded so far as the statute of Elizabeth is concerned in North Carolina and Kentucky, they have remained in force in Massachusetts, and have exercised an important influence on the legislation of a number of other states.

§ 92. **Massachusetts.** When the pilgrim fathers inaugurated the history of Massachusetts by landing in 1620 at Plymouth Rock, they completed their perilous journey in the Mayflower "as British subjects, submitting to the obligations and claiming the protection and privileges of the laws of England, as they then stood. All the statutes of the realm,

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[18] See Bill of Rights, Section 3.

[19] Section 35.

[20] Chapter 6, Section 6.

[1] Chapter 5, N. and C. 438.

[2] Chapter 5, Section 6, Laws of 1776. See Section 35, supra.

[3] Section 6, Article 8, Constitution of 1792. See Section 79, supra.

previously made, especially those altering, modifying, or declaring the common law, were included with and adopted as a part of that code.''[4] By an act passed soon after the granting of the provincial charter in 1691, all laws and ordinances in existence under the late colonial government were continued in force.[5] This policy was perpetuated by the constitution of 1780, which is still in force, and which provides that ''all the laws which have heretofore been adopted, used, and approved in the province, colony, or state of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature.''[6] Under this express authority, the statute of Elizabeth, being made by way of declaration and amendment of the common law, has been acted upon in the commonwealth as far as it is applicable to the state and its conditions, and as far as its judicial tribunals have been competent in point of jurisdiction to execute and carry its provisions into effect.[7] The statute, therefore, is a part of the local law so far as to ascertain what shall be considered as a charitable gift,[8] but not so far as it confers powers on tribunals unknown in the state.[9]

§ 93. **Indiana.** Five years before Indiana was carved out of the Northwest Territory, such territory had adopted the common law of England.[10] It was but natural that the new territory should follow this example. Accordingly, it passed a statute in 1807, which is still in force,[11] and which adopts all general English statutes passed prior to the year 1606 which are not local in their application. The question, whether the statute of Elizabeth is in force under this enactment, has received elaborate discussion. After the court had declared, in 1846, that it could not believe that the legislature intended to exclude the statute from the provisions of this

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[4] 1834, Going v. Emery, 33 Mass. (16 Pick) 107, 115, 26 Am. Dec. 645.

[5] 1834, Going v. Emery, supra.

[6] Chapter 6, Section 6.

[7] 1836, Sanderson v. White, 35 Mass. (18 Pick.) 328, 333, 29 Am. Dec. 591.

[8] 1905, Minot v. Parker, 189 Mass. 176, 180, 75 N. E. 149; 1863, Dexter v. Gardiner, 89 Mass. (7 Allen) 243; 1920, Pierce v. Attwill, 234 Mass. 389, 125 N. E. 609.

[9] 1834, Going v. Emery, 33 Mass. (16 Pick.) 107, 116, 26 Am. Dec. 645.

[10] 1846, McCord v. Ochiltree, 8 Blackf. 15, 19 (Ind.).

[11] Section 236, Burns Annotated Indiana Statutes, 1914.

act,[12] it experienced considerable difficulty in 1871 on the question whether or not the statute was not "local" in its provisions. It was correctly held that such statute, so far as its remedial provisions are concerned, had not been adopted, since "the persons selected and the machinery provided for the enforcement of the new remedy were local to the kingdom of Great Britain, and have no existence in this state, and are wholly unsuited to our laws, institutions and modes of administering justice."[13] In view of this decision, the court, in 1876, intimated in broad language that the statute was not in force in the state.[14] When, in 1882, counsel vigorously contended that a thesis, maintaining that only so much of the early case as held the statute not to be in force had been overruled in the cases just mentioned, would involve an unheard-of "judicial somersault," the court agreed with counsel "that the English statute of charitable uses, except, perhaps, as it may serve to indicate or define what are charities, is not in force here; because its provisions and machinery are local to the kingdom of Great Britain and are not applicable here."[15] Therefore, the English charity doctrine is in force under the Indiana statute.

§ 94. **Missouri, Illinois, Arkansas, Colorado, Wyoming and Florida.** The other states which have adopted the statute of Elizabeth deserve but shorter notice, as the matter has received but limited consideration. In 1816, five years before becoming a state through the Missouri compromise, **Missouri** adopted this statute,[16] which is still in force in the state.[17] The Missouri courts, while they do not deny that the statute is in force under this law,[18] have placed the emphasis on the inherent power of equity over charitable trusts independent of it,[19] declaring that the details of the statute are wholly inapplicable, though recognizing that the statute, so far as it

[12] 1846, McCord v. Ochiltree, 8 Blackf. 15, 21 (Ind.). See 1854, Richmond v. State, 5 Ind. 334, 336.

[13] 1871, Grimes v. Harmon, 35 Ind. 198, 243, 244, 250, 9 Am. Rep. 690.

[14] 1876, Lagrange County v. Rogers, 55 Ind. 297, 300.

[15] 1882, Erskine v. Whitehead, 84 Ind. 357, 364. See 1922, Long v. Union Trust Co. 280 Fed. 686 (affirming 272 Fed. 699).

[16] 1860, Chambers v. St. Louis, 29 Mo. 543, 586.

[17] Section 8047, Revised Statutes of Missouri, 1909; 1919, Robinson v. Crutcher, 277 Mo. 1, 209 S. W. 104.

[18] 1911, Buchanan v. Kennard, 234 Mo. 117, 134, 136 S. W. 415.

[19] 1899, Lackland v. Walker, 151 Mo. 210, 242, 52 S. W. 414.

declares what are charities, has been quite influential.[20] In **Illinois** the adoption statute was passed in 1845 and is still in force.[1] Acting under it, though not specifically mentioning it, the courts of Illinois have uniformly declared that the statute of Elizabeth forms a part of the common law of the state,[2] and that such statute has not been repealed by the statutes for the regulation and maintenance of state charitable institutions.[3] In **Arkansas** the adoption statute was passed at an early date[4] and, as declared by the supreme court, has made the statute of Elizabeth a "part of the common law inherited from the mother country."[5] In **Colorado** the statute was passed in 1861, was repealed and reënacted in 1868, is in force to-day,[6] and incorporates the statute of Elizabeth into the jurisprudence of the state so far as that statute indicates what are charitable trusts, and so far as it gives validity to gifts for such uses.[7] The statute has also been passed in **Wyoming,** but has not received any judicial construction.[8] In **Florida** it has been made to include the English statutes passed prior to 1776.[9] The only case arising in that state has not referred to this statute. Its decision, however, would indicate that the doctrine of the statute of Elizabeth is in force in the state.[10]

§ 95. **Third Class of Majority Group. Alabama, Vermont, Arizona, California, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington.** There was good reason why a number of states during the revolutionary war should ex-

[20] 1887, Howe v. Wilson, 91 Mo. 45, 49, 3 S. W. 390, 60 Am. Rep. 226.

[1] Chapter 35, Courtney's Illinois Statutes, 1916.

[2] 1919, Skinner v. Northern Trust Co., 288 Ill. 229, 123 N. E. 289; 1867, Heuser v. Harris, 42 Ill. 425, 429; 1884, Andrews v. Andrews, 110 Ill. 223, 230; 1887, Hunt v. Fowler, 121 Ill. 269, 276, 12 N. E. 331; 1898, Hoeffer v. Clogan, 171 Ill. 462, 467, 49 N. E. 727, 40 L. R. A. 730, 63 Am. St. Rep. 241; 1907, Welch v. Caldwell, 226 Ill. 488, 497, 80 N. E. 1014.

[3] 1893, Crerar v. Williams, 145 Ill. 625, 644, 34 N. E. 467, 21 L. R. A. 454 (affirming 44 Ill. App. 497).

[4] Section 623, Kirby's Digest of the Statutes of 1904.

[5] 1905, Biscoe v. Thweatt, 74 Ark. 545, 549, 86 S. W. 432.

[6] Mills Annotated Statutes of Colorado of 1912, Section 6992.

[7] 1902, Clayton v. Hallett, 30 Colo. 231, 247, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; 1917, Haggin v. International Trust Co., 69 Colo. 147, 169 Pac. 138, 139.

[8] Section 3588, Wyoming Compiled Statutes.

[9] Florida Compiled Laws, Section 59.

[10] 1911, Louis v. Gaillard, 61 Fla. 819, 841, 56 So. 281.

pressly continue in force, not only the common law of England, but also its statutes so far as they are applicable to American conditions. The English statutes were needed because these states, during their colonial existence, had created no written law designed to take, or capable of taking, their place. An entirely different situation has confronted a number of states whose admission into the Union has been of a comparatively recent date, and who, through a somewhat extended territorial existence at the time of their admission, had acquired a code of their own, thus making the adoption of the English statutes a matter of minor importance. Two older states, Alabama and Vermont, must also be included here. Accordingly, statutes adopting merely the common law which is applicable to their condition and not in conflict with their constitutions, have been passed by Alabama,[11] and Vermont,[12], and by Arizona,[13] California,[14] Idaho,[15] Kansas,[16] Montana,[17] Nebraska,[18] Nevada,[19] New Mexico,[20] North Dakota,[1] Oklahoma,[2] South Dakota,[3] Utah,[4] and Washington.[5]

§ 96. **Judicial Construction of Such Statutes.** The English charity doctrine certainly prevails in the two older states of Vermont[6] and Alabama.[7] While the subject has remained dormant in a number of the other states, so far as any judicial action is concerned, others, such as California,[8]

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[11] Section 12, Code of Alabama, 1907.

[12] Section 1221, Public Statutes of Vermont.

[13] Section 5555, Revised Statutes of Arizona, 1913, Civil Code.

[14] Political Code, Section 4468.

[15] Section 18, Revised Code of Idaho.

[16] Kansas G. S. 1905, Section 8746 (Section 3, Chapter 119, General Statutes of 1868).

[17] Section 6213, Revised Codes of Montana, 1907.

[18] Section 6955, Corbey's Annotated Statutes of Nebraska.

[19] Section 5474, Revised Laws of Nevada, 1912.

[20] Section 1354, New Mexico Statutes Ann., 1915.

[1] Section 4331, Compiled Laws of North Dakota, 1913.

[2] Section 4973, General Statutes of Oklahoma, 1908.

[3] Section 6, Civil Code Compiled Laws of South Dakota, 1910.

[4] Section 2488, Compiled Laws of Utah, 1907.

[5] Pierce Washington Code 81, Section 1.

[6] 1835, Burr v. Smith, 7 Vt. 241, 283, 29 Am. Dec. 154. See 1915, In re Curtis, 88 Vt. 445, 450, 92 Atl. 965.

[7] 1851, Carter v. Balfour, 19 Ala. 814, 829. See 1885, Johnson v. Holifield, 79 Ala. 423, 426, 58 Am. Rep. 596.

[8] 1881, In re Hinkley, 58 Cal. 457, 504, 505. This case, on page 482, holds that the California statute, which provides for what purpose express trusts may be created, is limited to private trusts and does not relate to public charities. The court states

Kansas,[9] New Mexico,[10] North Dakota,[11] Utah,[12] and Washington,[13] have had occasion to pass on the question, and have invariably adopted the English doctrine, though not mentioning their own statute. The state statute has been referred to by the Nebraska court in holding that the provisions of the statute of Elizabeth are not enforcible in the state, but that its courts have power in the administration of testamentary uses equal to those possessed by the English courts, and that hence bequests for charitable purposes will be viewed with favor and carried into effect, if this can be done consistent with established legal principles.[14] In view of these decisions, in view of the decisions of states which have no statute whatsoever hereinafter referred to, and in view of the general trend in the direction of the English charity doctrine, it is certain that the courts of those states which have such a statute, but have not yet applied it to the statute of Elizabeth, namely, Arizona, Idaho, Montana, Nevada, Oklahoma and South Dakota, will adopt the English rule when the matter is finally presented to them for decision.

§ 97. **Fourth Class of Majority Group.** It has been seen that the subject of charity has been very vitally affected in the various American states by statutory enactments and constitutional provisions. In fact, in the last analysis, aberrations from the English doctrine are due to legislative interference or constitutional provisions. In a few states the

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that since it makes no direct reference to charitable trusts, it should not be construed to cover them particularly as the evils against which it is aimed, the permanent settlement of real property in families, is inapplicable to charities. Such a construction would make charitable devises void, but leave charitable bequests valid, a strange condition in the law.

[9] 1898, Harrison v. Brophy, 59 Kans. 1, 51 Pac. 883, 40 L. R. A. 721; 1901, Troutman v. Boissiere Odd Fellow's Orphans' Home, 64 Pac. 33, 5 L. R. A. (N. S.) 692 (Kans.); 1907, Washburn College v. O'Hara, 75 Kans. 700, 90 Pac. 234; 1910, Ingleside Ass'n v. Nation, 83 Kans. 172, 109 Pac. 984.

[10] 1916, Albuquerque Board of Education v. School District No. 5, 21 N. M. 624, 157 Pac. 668.

[11] 1909, Hagen v. Sacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[12] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 31 Pac. 436; reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44; 1898, Staines v. Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788; 1913, Mansfield v. Neff, 43 Utah 258, 134 Pac. 1160.

[13] 1901, In re Stewart's Estate, 26 Wash. 32, 38, 66 Pac. 148, 67 Pac. 723.

[14] 1908, In re Nilson, 81 Neb. 809, 813, 116 N. W. 971; 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 801, 802, 84 N. W. 273, 83 Am. St. Rep. 553.

legislature has righted its own mistakes, and in some of these it has put the matter beyond dispute by extensive statutes covering the entire subject. In almost one-half of the states, however, the legislature has done nothing of any consequence except that it has adopted the English common law or both the English statutes and common law. This leaves a group of states in which the legislature has not even done this, but has entirely ignored the subject. This group comprehends old and new states, though, in some of the latter, statutes of parent states have had considerable influence.

§ 98. **Delaware, New Hampshire, New Jersey and South Carolina.** The original states in which no statute regulating the matter has been passed are Delaware, New Hampshire, New Jersey and South Carolina. Despite this fact, the **Delaware** courts enforce the English charity doctrine on the ground that the jurisdiction of the English court of chancery over charitable trusts exists independently of any statute, and that it is this jurisdiction which was inherited by the state.[15] In **New Jersey** the courts have uniformly maintained the proposition that the statute of Elizabeth is not in force,[16] but that there is no difference whatever between the common law of England, founded in part on the statute, and the law of the state in regard to what constitutes a charity.[17] In **South Carolina** the court, even on the supposition that the jurisdiction over charities did not exist before the statute of Elizabeth, has held that it has grown up since, and that it has become so firmly established as to be authoritative in the state under the chancellor's own proper chancery jurisdiction independent of the statute of Elizabeth.[18] In **New Hampshire** the court has taken notice that the statute has not been repealed,[19] and that the state has adopted no regulation—statutory or constitutional—concerning charities,[20]

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[15] 1875, Doughten v. Vandever, 5 Del. Ch. 51, 63.

[16] 1868, Norris v. Thomson, 19 N. J. Eq. (4 C. E. Green) 307, 312 (Affirmed 20 N. J. Eq. (5 C. E. Green) 489); 1882, Hesketh v. Murphy, 36 N. J. Eq. (9 Stew.) 304, 306 (affirming 35 N. J. Eq. (8 Stew.) 23).

[17] 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 664, 665, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[18] 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 107, 1 Rich. Law. 176, note (S. C.).

[19] 1901, Haynes v. Carr, 70 N. H. 463, 483, 49 Atl. 638.

[20] 1819, Union Baptist Society v. Canthia, 2 N. H. 20, 21.

and has concluded that the matter is governed by the established principles of the common law of which its courts have taken original and inherent jurisdiction, independent of the statute.[1] Of course, where such principles are in any case clearly inapplicable to the state's institutions, they will be disregarded.[2]

§ 99. **Statutes by Parent States.** It is a very natural thing that when a new is carved out of an old state, the laws in force in the older state should exercise a strong influence on the budding jurisprudence of the new arrival. There must be some rule of decision, and none is closer at hand, easier to reach, and better understood than that which prevails in the parent state. Accordingly, two states, Maine and Tennessee, have been influenced by the statutes of Massachusetts and North Carolina, respectively, though these statutes have not formally been reënacted by them.

§ 100. **Tennessee.** While Tennessee was still a part of North Carolina, that state, in 1778, adopted all such English statutes as were consistent with the freedom and independence of the state and its form of government.[3] This fact, as well as the settled doctrine, "that English statutes, passed before the emigration of our ancestors, which were applicable to our situation and government, constitute a part of the common law of this country,"[4] could not but exercise a great influence over the courts of Tennessee after the "territory south of the Ohio" had become a state in 1796. Outside of this North Carolina act, the Tennessee court, however, has been left without the aid of legislative enactments and has been limited to the common law, English statutes and English expositions of them as its sources of information.[5] It has accordingly held that the practice of the chancellor under the statute of Elizabeth is not to be followed,[6] and that only those powers over charities exercised by the chancellor by virtue of his judicial powers (as distinguished

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[1] 1898, Webster v. Sughrow, 69 N. H. 380, 381, 45 Atl. 139, 48 L. R. A. 100; 1881, Goodale v. Mooney, 60 N. H. 528, 533, 49 Am. Rep. 334.

[2] 1819, Union Baptist Society v. Canthia, 2 N. H. 20, 21.

[3] Chapter 5 (N. and C. 438); 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 233.

[4] 1844, Green v. Allen, 24 Tenn. 170, 233.

[5] 1844, Green v. Allen, 24 Tenn. 170, 178.

[6] Green v. Allen, 24 Tenn. 170, 207.

from his legislative and delegated powers) are in force in the state.[7] While holding that the statute of Elizabeth as such is not in force, it has held that such of its conservative provisions as were law before its enactment remained in force, not because of the statute, but because being unrepealed by the statute they did not cease to be law because they were embodied in a statute which could not be carried out for want of the necessary machinery.[8]

§ 101. **Maine.** When Maine, in 1820, under the Missouri compromise was admitted to statehood, it naturally retained a great deal of the law of Massachusetts of which it had since 1660 been a part under the name of the "District of Maine." Among the laws thus inherited from the mother state was the statute of Elizabeth which formed, "in principle and substance, a part of the law of Massachusetts."[9] Accordingly, the statute is regarded as a part of the common law of the state,[10] though this refers only to its general provisions.[11] Even as to these the powers of the Maine courts have been stated to have been neither exclusively derived from, nor restricted, by the statute,[12] though it has been said to have been incorporated into the state's chancery jurisprudence by the general statutes of the state.[13]

§ 102. **Texas, Iowa, Ohio, Oregon. Generally.** This leaves four newer states, widely scattered, in which the English doctrine has been upheld though the legislature has taken no action. One of these, Texas, was at one time an independent republic; another, Iowa, is a part of the Louisiana purchase; the third, Ohio, is one of the five states carved out of the Northwest Territory; while the fourth, Oregon, is formed of a part of the territory which was involved in the famous Northwest Boundary Dispute.

§ 103. **Oregon, Texas, Ohio.** The power of the courts of **Oregon** over charitable trusts is derived from the common

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[7] 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 366; 1872, Frierson v. General Assembly Presbyterian Church, 54 Tenn. (7 Heisk.) 683, 694.

[8] 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 365, 367.

[9] 1865, Drew v. Wakefield, 54 Me. 291, 298.

[10] 1858, Preacher's Aid Society v. Rich, 45 Me. 552, 559.

[11] 1858, Tappan v. Deblois, 45 Me. 122, 128.

[12] 1858, Tappan v. Deblois, 45 Me. 122, 131.

[13] 1860, Howard v. American Peace Society, 49 Me. 288, 302.

law,[14] and consists of an original inherent jurisdiction by virtue of their inherent powers without reference to whether or not the statute of Elizabeth has been adopted in the state.[15] In **Texas** the English law as to trusts was in force while the commonwealth was still an independent republic.[16] Courts of equity, therefore, have jurisdiction over charities by virtue of their general powers independent of any statute.[17] Any attempt to deny to the courts the power to uphold and enforce charities has found no countenance,[18] since such power from an early date has become firmly embedded into the state's judicial system.[19] Though the statute of Elizabeth has not been in terms adopted in **Ohio,** its principles and doctrines have been taken over by its courts,[20] and enter to a certain extent into the jurisprudence of the state.[1] This adoption, however, has not been entirely uninfluenced by the action of the legislature. That body, early in the history of the state, passed a law making all gifts to the poor of a township good and valid in law, and passing the title to property so given to the trustees of such townships for the use of their poor.[2] The spirit and policy of this legislation has been absorbed by the courts and has led them to uphold gifts not within its letter though charitable on general principles.[3]

§ 104. **Iowa.** Shortly after the territorial status of Iowa had come to an end by the admission of the new state into the Union, in 1846, the courts settled the doctrine of charitable trusts in the new state, though not without difficulty. An early case decided in 1852[4] was overruled four years later on the ground that the court would not allow a rule hastily

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[14] 1896, In re John, 30 Or. 494, 511, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

[15] 1891, Pennoyer v. Wadhams, 20 Or. 274, 279, 280, 25 Pac. 720, 11 L. R. A. 210.

[16] 1863, Paschal v. Acklin, 27 Tex. 173, 193, 194.

[17] 1908, Rhodes v. Maret, 112 S. W. 433, 435 (Tex. Civ. App.); 1857, Hopkins v. Upshur, 20 Tex. 89, 95, 70 Am. Dec. 375.

[18] 1858, Bell County v. Alexander, 22 Tex. 350, 364, 365, 73 Am. Dec. 268.

[19] 1863, Paschal v. Acklin, 27 Tex. 173, 197.

[20] 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 501, 16 L. Ed. 701; 1853, Urmay v. Wooden, 1 Ohio St. 160, 164, 59 Am. Dec. 615; 1902, State v. Toledo, 23 Ohio Cir. Ct. Rep. 327, 343.

[1] 1874, Miller v. Teachout, 24 Ohio St. 525, 533; 1921, Palmer v. Oiler, 102 Ohio St. 271, 131 N. E. 362.

[2] Swan's Statutes, Section 637 (1831).

[3] 1853, Urmay v. Wooden, 1 Ohio St. 160, 166, 59 Am. Dec. 615.

[4] 1852, Marshall v. Chittenden, 3 G. Greene 382 (Iowa).

settled to grow up and receive its subsequent sanction.[5] Since that time, many questions of importance have come before the courts of the state in which the common law doctrine of charities has been applied. It can, therefore, admit of no doubt that the statute of Elizabeth, or at least the English charity doctrine, is part of the common law of Iowa.[6]

§ 105. **Federal Courts.** It has been seen that the United States Supreme Court is in large measure responsible for the rule which exists in Virginia, West Virginia, Maryland, and the District of Columbia.[7] The position which the federal courts will take in charity cases is important, since many such cases, on account of diversity of citizenship, can well be thrown into the federal courts. That this has not been done to a greater extent is due to the fact that the Federal Supreme Court has adopted the policy of absolutely following the state rule in this matter, whatever it may be. Thus, in the famous case of **Vidal v. Girard,**[8] it followed the law of Pennsylvania. In another case, involving a large amount of property, it has followed and applied the Louisiana law, though this law is based on civil and not on common law conceptions.[9] It was but natural that, after the early case of **Philadelphia Baptist Association v. Hart**[10] had in part been overruled by the Girard case just mentioned, litigants in Virginia and Maryland should apply to the federal courts in preference to the state courts where their side of the case appeared to be foredoomed in the state courts. This attempt has availed them nothing since the supreme court, in cases arising in these jurisdictions, still follows the Hart case.[11] Of course, where a charitable gift would be valid in either of these states, it will also be upheld by the federal courts. Thus, the court

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[5] 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 368 s. c. 4 Iowa 252.

[6] 1909, Klumpert v. Vrieland, 142 Iowa 434, 444, 121 N. W. 34.

[7] See Sections 7 and 36, **supra.**

[8] 43 U. S. (2 How.) 127, 11 L. Ed. 205.

[9] 1853, McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 14 L. Ed. 732. See also 1897, Sickles v. New Orleans, 80 Fed. 868, 874; 26 C. C. A. 204; 1895, Wood v. Paine, 66 Fed. 807, following the Rhode Island Law.

[10] 17 U. S. (4 Wheat) 1, 4 L. Ed. 499.

[11] 1883, Russell v. Allen, 107 U. S. 163, 167, 168, 27 L. Ed. 397, 2 S. Ct. 327. See 1877, Kain v. Gibbony, 101 U. S. 362, 25 L. Ed. 813; 1850, Wheeler v. Smith, 50 U. S. (9 How.) 55, 76, 80, 13 L. Ed. 44; 1907, Miller v. Ahrens, 150 Fed. 644; 1855, Board of Foreign Missions v. McMaster, Fed. Cas. No. 1,586, 4 Am. Law. Reg. 526; 1850, Meade v. Beale, Fed. Cas. No. 9,371, Taney 339, 2 Car. Law. Rep. 329.

has discussed and applied the statutory exceptions made to the Virginia doctrine in 1839 and 1841,[12] and has held a gift to an incorporated domestic mission to be valid in Maryland on the ground that domestic missions constitute a part of its corporate purposes.[13] The view thus taken as to Virginia and Maryland, of course, applies equally to West Virginia which has substantially the same law on this subject. In view of the stand thus taken, it may confidently be asserted that no particular advantage can be gained by transferring charity cases from the state tribunals to the federal courts.[14]

§ 106. **Divergence in the Authorities.** It is not unnatural that confusion should have resulted from the two divergent lines of authorities above noted. Attorneys for the heirs naturally have relied upon cases decided in such states as Virginia or New York, though the state of the forum had already adopted the English charity doctrine. Opposing counsel, for one reason or another, have not always properly refuted such contentions. Nor have the courts in all instances detected the speciousness of the argument and have occasionally fallen a victim to it, particularly in the earlier cases. An illuminating case in point is Georgia.[15] The general tendency, of course, is in the direction of greater and greater liberality, as is illustrated not only by legislation in such states as New York,[16] Michigan,[17] Wisconsin,[18] and Pennsylvania,[19] but also by a comparison of the earlier with the later decisions of various courts.[20]

§ 107. **Summary.** Due in part to the repeal of the statute of Elizabeth by them, in part to an early decision of the United States Supreme Court, Virginia, West Virginia, Maryland and the District of Columbia have been led away from

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[12] 1899, Handley v. Palmer, 91 Fed. 948, 954 (affirmed 103 Fed. 39, 43 C. C. A. 100).

[13] 1894, Domestic and Foreign Missionary Society v. Gaither, 62 Fed. 422.

[14] See 1921, Long v. Union Trust Co., 272 Fed. 699 (affirmed 280 Fed. 686).

[15] 1872, Newson v. Starke, 46 Ga. 88, 91. See Section 82, supra.

[16] See Sections 47 to 56, supra.

[17] See Sections 57 to 60, supra.

[18] See Sections 61 to 65, supra.

[19] See Sections 86 to 90, supra.

[20] 1908, In re Nilson, 81 Neb. 809, 821, 116 N. W. 971, and cases there cited from such states as Wisconsin, Iowa, Connecticut, Indiana and New York. See particularly 1857, Lepage v. McNamara, 5 Iowa (5 Clark) 124, 145; 1903, Grant v. Saunders, 121 Iowa 80, 86, 95 N. W. 411, 100 Am. St. Rep. 310; 1842, Holland v. Peck, 37 N. C. 255, 262; 1844, Green v. Allen, 24 Tenn. 170, 208.

the English charity doctrine, and have but partially recovered their lost ground through legislative action. The same misfortune has befallen New York, Michigan, Wisconsin and Minnesota through a codification of the law of trusts which abolished all trusts except as expressly authorized or modified. All these four states, however, with the exception of Minnesota, have now found their way back to the English charity rule. In still another state, Mississippi, all charitable devises and all bequests in favor of religious charities have been declared void by the constitution. With the exceptions just mentioned, the English charity rule is in force in all the remaining states of the Union, though its legal foundation is not by any means the same in all or even a majority of them. Such doctrine rests on extensive legislative acts directly recognizing it in Connecticut, Georgia, Kentucky, Louisiana, North Carolina, Pennsylvania and Rhode Island. It rests on statutes which adopt the English enactments passed before 1606 in Arkansas, Colorado, Florida, Illinois, Indiana, Massachusetts, Missouri and Wyoming. Its only legislative foundation in Alabama, Arizona, California, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont and Washington is a statute which adopts the common law. In the remaining ten states, namely, Delaware, Iowa, Maine, New Hampshire, New Jersey, Ohio, Oregon, South Carolina, Tennessee and Texas the doctrine has been laid down by the courts without any direct legislative recognition of any kind. The earlier cases must be distinguished on account of the obscurity in which the subject was then enveloped. No advantage will be gained by going into the federal courts, because such courts on this subject simply enforce the state law as they find it.

CHAPTER III

CY PRES DOCTRINE

§ 117. **Roman Law.** The **cy pres** doctrine can readily be traced back into the Roman law. It is reported that early in the third century a legacy was left to a city with directions to use its income to preserve the donor's memory by yearly games. Such games being illegal, the question arose what was to be done with the gift. The answer by Modestinus, a celebrated contemporaneous jurist, was as follows: "Since the testator wished games to be celebrated which are not permitted, it would be unjust that the amount which he has destined to that end should go back to the heirs. Therefore, let the heirs and magnates of the city be cited, and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner."[1]

§ 118. **Middle Ages. Situation.** This thought that "one kind of charity would embalm the testator's memory as well as another"[2] was prevalent, particularly during the middle ages when superstition ruled supreme. Numerous English wills from that period sound the keynote of salvation by church agencies at a price.[3] Since charity was bestowed as an expiation of sins and as an entering wedge into heaven, a doctrine which denied effect to a particular charity for political reasons, without carrying out the general intent of the donor to obtain salvation in any event, would have been considered to be grossly injurious to his soul. No matter how vague or unlawful the charity contemplated might be, if charity was intended, the courts would carry out this intention by devising a scheme where the charity was vague, or by designating a lawful charity where it was illegal. This

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[1] Pandects of Justinian Digest Lib. 33 Tit. 2 Law 16, cited in 1889, Mormon Church v. United States, 136 U. S. 1, 52, 34 L. Ed. 478, 10 S. Ct. 792.

[2] Wilmot, C. J., in 1767, Attorney General v. Downing, Wilmot's Notes 1, 33, 1 Jarm. on Wills 243, note.

[3] See an article of Joseph Willard, "Illustrations of the Origin of Cy Pres," in 8 Harv. Law Review 69. See 1 Am. L. Reg. (N. S.) 129, 340.

doctrine "had its origin in the strong desire of the ecclesiastical chancellors to uphold every gift to the church, and every act that subjected property to its control."[4]

§ 119. **Reasonable Basis of English Cy Pres Doctrine.** The English **cy pres** doctrine, in its inception, thus actually rested on a reasonable basis. The one great and predominant intent of the testator was carried out, though his particular directions were incapable of execution. The time, however, came when the light of day broke in upon medieval darkness and dispelled the notions by which donors had hitherto been guided. This light, of course, did not prevent them from making gifts which were illegal or unintelligible. Neither did it prevent the courts from following precedent, rather than principle, in construing such wills. Accordingly, despite the essential changes which had taken place, such gifts were by a resort to the "sign manual" and the "royal prerogative" upheld and applied to objects as near to that indicated by the testator as possible.[5] This doctrine has fitly been designated as "an arbitrary rule introduced into the common law from the civil law, clothing the judges with a discretion regulated by no rules or principles, but depending entirely on the exercise of their will."[6] It is a rule begotten and born out of the union of medieval superstition with the royal prerogative, and has been sponsored by the civil law as its godfather.

§ 120. **English Cy Pres Doctrine not Judicial.** This English **cy pres** doctrine certainly is not a judicial doctrine in the strict sense of the word, but is rather "a doctrine of prerogative or sovereign function."[7] Whether the crown acts directly by sign manual, or indirectly through the equity courts,[8] the basis of the action is an arbitrary and prerogative discretion[9] "contemning and disregarding the rules by which the court of chancery, in the exercise of its own proper

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[4] 1867, Attorney General v. Dutch Reformed Protestant Church, 36 N. Y. 452, 457 (affirming 33 Barb. 303).

[5] 1911, French v. Lawrence, 76 N. H. 234, 81 Atl. 705.

[6] 1872, Pringle v. Dorsey, 3 S. C. 502, 509.

[7] 1876, Heiss v. Murphey, 40 Wis. 276, 292.

[8] 1858, Beekman v. People, 27 Barb. 260, 290 (Affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[9] 1871, Grimes v. Harmon, 35 Ind. 198, 233, 9 Am. Rep. 690.

jurisdiction over trusts, has invariably been governed,"[10] and clothes a judicial officer with ministerial functions[11] and arbitrary powers.[12] In its practical application, it results quite frequently in the making of "an approximate or discretionary will for a testator where he has only declared some indefinite, illegal, or ineffectual charitable purpose."[13]

§ 121. **Examples of English Cy Pres Application.** We shall not review the English cases in which, by the application of this doctrine, the donor's intention has more or less been subverted. One prominent example only will be cited. A gift by a Jew toward establishing a "Jesuba" for reading the law and instructing persons in the **Jewish** religion, being illegal when the case came before Lord Hardwick in 1753, was applied to support a preacher for and provide instruction in the **Christian** religion to the children of a foundling hospital.[14] This case is merely an extreme example of the preposterous perversion of the donor's intent,[15] which results from the application of the English doctrine under a pretense of carrying out the donor's general directions.[16] Its principle is "too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."[17] Therefore, this doctrine has been freely criticized as being so flexible in its import, and susceptible of such a variety of legal definitions, that it can always be plausibly invoked in aid of a doubtful jurisdiction,[18] and has been denounced even in England by Lord

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[10] 1850, Andrew v. New York Bible and Prayer Book Society, 6 N. Y. Super. St. (4 Sandf.) 156, 179 (Reversed 8 N. Y. (4 Seld.) 559), Selden Notes 192.

[11] 1917, Adams v. Bohon, 176 Ky. 66, 195 S. W. 156, 161.

[12] 1899, In re Upham, 127 Cal. 90, 94, 59 Pac. 315; 1857, Wilson v. Lynt, 30 Barb. 124, 131 (N. Y.); 1842, Holland v. Peck., 37 N. C. (2 Ired. Eq.) 255, 261.

[13] 1861, Beekman v. Bonsor, 23 N. Y. 298, 308; 80 Am. Dec. 269 (affirming 27 Barb. 260).

[14] 1753, Da Costa v. De Pas, Ambler 228, 2 Swanst. 487 note. The same ruling has also been applied where the testator was a Roman Catholic and left his property for the purpose of propagating the Catholic religion; 1802, Cary v. Abbot, 7 Ves. 490; Rex v. Portington, 1 Salk. 162, s. c. 3 Salk. 334.

[15] 1902, Thompson v. Brown, 24 Ky. Law. Rep. 1066, 1070, 70 S. W. 674, 62 L. R. A. 398 (reversed 116 Ky. 102, 75 S. W. 210, 62 L. R. A. 398, 105 Am. St. Rep. 194).

[16] 1888, Minot v. Baker, 147 Mass. 348, 351, 17 N. E. 839, 9 Am. St. Rep. 713.

[17] 1832, Methodist Church v. Remmington, 1 Watts 218, 226, 26 Am. Dec. 61 (Pa.). See 1920, Curtis and Barker v. Central University, 188 Iowa 300, 176 N. W. 330.

[18] 1866, Bascom v. Albertson, 34 N. Y. 584, 602.

Kenyon as going "to the utmost verge of the law,"[19] while Lord Eldon has said that it should not be extended one step farther.[20]

§ 122. **English Doctrine not in Force in America.** Most of the colonists who came to America during the course of the seventeenth century had, on account of their religious faith, been persecuted within and driven away from the shores of old England. They had superstitions of their own, but did not bring with them the notions which lie at the base of the English **cy pres** doctrine. They fled from the autocracy of the English established church, though many at once proceeded to establish an ecclesiastical autocracy of their own. Until 1776, they remained subjects of the English king, but under the primeval conditions which prevailed, there was little or no occasion to resort to the **cy pres** doctrine. After the last tie with England had been cut, and the independence of the thirteen colonies had been recognized even by the mother country, these states, which still had an established church, by a more or less protracted struggle, disestablished it. Complete liberty, civil as well as religious, had been achieved when the material progress of the country, after the first third of the nineteenth century, brought questions of charitable trusts in ever-increasing number into the courts. It was inevitable that a contention in favor of the English **cy pres** doctrine should be made, and equally inevitable that it should be overruled. Of the double basis of this doctrine, any superstition of the middle ages had never been a force in the new world,[21] while the royal prerogative had been renounced in the most solemn manner by the declaration of independence, and had been abrogated by the Revolutionary War. In addition, the distribution of the powers of government into three departments, adopted by the federal and followed by the state constitutions, had actually prohibited American courts from exercising a juris-

[19] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 574.

[20] 1852, White v. Fisk, 22 Conn. 31, 55.

[21] The Massachusetts court says that the exercise of the sign manual power in cases of bequests to charitable objects in conflict with an established religion cannot "exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the government, because superstitious or illegal"; 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 575.

diction so purely discretionary.[1] Accordingly, this doctrine, so far as it is prerogative,[2] and perverts funds given in support of an illegal or impractical charity from the founder's design, under pretense of carrying out his general intention, has not been adopted in America where conjecture is not allowed to take the place of science, and where prerogative which begins where interpretation ends is not recognized, but has been cut off as a tumor[3] and eliminated as a creative energy.[4] An attempt in America to hold a gift to a religious purpose to be void, but put the fund at the disposition of the government as **parens patriae** to some other charitable use by sign manual "would meet the just execration of a free people, whose boast it is to tolerate alike all religions, and permit every man to worship God according to his own conscience."[5] While English courts have sometimes devised a scheme in which the donor might not be able to recognize any analogy to his design, American courts have, therefore, contented themselves with carrying into effect, in accord with the rules of law, the intention of the donor intelligently expressed.[6] It has, therefore, been stated that where trustees have no power to appoint the charity, and there is no failure in the object of the donation, no unexpected undisposed surplus, no increase of funds beyond the needs of the charity, and no change of the law making any of its objects unlawful, there is in America no room for the application of the **cy pres** doctrine.[7]

§ 123. **Judicial Doctrine retained in America.** The

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[1] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 548.

[2] 1913, Morris v. Boyd, 110 Ark. 468, 476, 477, 162 S. W. 69; 1875, Doughten v. Vandever, 5 Del. Ch. 51, 64; 1887, Hunt v. Fowler, 121 Ill. 269, 276, 12 N. E. 331; 1882, Erskine v. Whitehead, 84 Ind. 357, 364; 1871, Grimes v. Harmon, 35 Ind. 198, 233, 9 Am. Rep. 690; 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 369, s. c. 4 Iowa 252; 1857, Lepage v. McNamara, 5 Iowa (5 Clarke) 124, 145; 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 802, 84 N. W. 273, 83 Am. St. Rep. 553; 1842, Holland v. Peck, 37 N. C. (2 Ired. Eq.) 255; 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 366.

[3] 1867, Cromie v. Louisville Orphan's Home Society, 66 Ky. (3 Bush.) 365, 374; 1917, Adams v. Bohon, 176 Ky. 66, 195 S. W. 156.

[4] 1861, Beekman v. Bonsor, 23 N. Y. 298, 311, 80 Am. Dec. 269 (affirming 27 Barb. 260).

[5] 1858, Beekman v. People, 27 Barb. 260, 286 (affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[6] 1867, Attorney General v. Reformed Protestant Dutch Church, 36 N. Y. 452, 457 (affirming 33 Barb. 303).

[7] 1896, In re John, 30 Ore. 494, 532, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

elimination of the English prerogative doctrine does not, however, eliminate the **cy pres** doctrine in its entirety. It is clear that it is only that branch of this doctrine which undertakes to give effect to vague or illegal charities which is prerogative.[8] This leaves a **cy pres** power which is "judicial in its origin and character, recognized and exercised by the English and the American courts generally, though rejected by some of the latter, and by some carried to a much greater extent than by others."[9] This power is independent of any royal prerogative, and consists of ascertaining and enforcing the general intention of the testator when changes of circumstances have made his specific directions incompatible with it.[10] It applies only where there is an available charity to an identified or ascertainable object, and the particular mode prescribed for its administration has become illegal, inadequate, or inappropriate.[11] It presupposes a trustee indicated in some manner.[12] It is based "upon the ground of general chancery power, entirely separate and distinct from any thought of prerogative power, and for the purpose of carrying out as nearly as possible the true intention of the donor."[13] It stops where prerogative under the English system begins. It takes hold of the property only to apply it when the object is clear and the property has been disposed of in the very act that constitutes the charity. It operates principally **in personam** and only incidentally **in rem,** while the English doctrine operates principally **in rem** and only incidentally **in personam.**[14] Under it a charitable gift

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[8] 1872, Newson v. Starke, 46 Ga. 88, 96.

[9] 1882, Erskine v. Whitehead, 84 Ind. 357, 364. In Massachusetts this doctrine has "been so extended as almost to equal the exercise of the prerogative power in England"; 1899, Spalding v. St. Joseph's Industrial Schools, 107 Ky. 382, 403, 21 Ky. Law. Rep. 1107, 54 S. W. 200.

[10] 1889, Adams Female Academy v. Adams, 65 N. H. 225, 226, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785.

[11] 1836, Moore v. Moore, 34 Ky. (4 Dana) 354, 366, 29 Am. Dec. 417.

[12] 1919, Robinson v. Crutcher, 277 Mo. 1, 209 S. W. 104.

[13] 1903, Grant v. Saunders, 121 Iowa 80, 84, 95 N. W. 411, 100 Am. St. Rep. 310; 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 467, 8 S. W. 346; 1884, Rhode Island Hospital Trust Company v. Olney, 14 R. I. 449, 452; 1884, Pell v. Mercer, 14 R. I. 412; 1899, St. Peter's Church v. Brown, 21 R. I. 367, 369, 43 Atl. 642; 1874, Ould v. Washington Hospital for Foundlings, 1 MacArthur 541, 550, 551, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[14] 1871, Grimes v. Harmon, 35 Ind. 198, 247, 248, 9 Am. Rep. 690.

is not applied to any other purpose than that designated by the testator on the theory that such diversion will accomplish as much for charity as the one which he has pointed out.[15] The question whether this doctrine is confined to charities has been answered in the affirmative in Maine and Rhode Island,[16] and in the negative in New Hampshire and Pennsylvania.[17]

§ 124. **Liberal Construction.** There is nothing mythical connected with this American doctrine. It may even be carried out under the form of decreeing specific performance.[18] Courts are simply acting intelligently when they apply it. They are ascertaining the meaning of a testator from the expressions of the instrument, or by inferences legitimately deduced therefrom with the aid of the established rules of interpretation.[19] They are merely construing the instrument before them in a liberal manner,[20] with a view of promoting and accomplishing the donor's charitable intent.[21] Their action is not arbitrary, but moves in strict conformity with the one central rule of testamentary construction—the ascertainment and execution of the testator's intention.[22] It does not move in disregard of the donor's wishes, but is "as truly based upon a judicial finding of his intention as applied to new conditions, as is the construction of a will, deed, or other written contract."[23] It is not the benevolence of the chancellor, but that of the testator that is thus effectuated.[1] In short, the rule in the last analysis is a simple rule of lib-

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[15] 1891, Roach v. Hopkinsville, 13 Ky. Law. Rep. 543; 1867, Venable v. Coffman, 2 W. Va. 310, 320.

[16] 1912, Lynch v. South Congregational Parish, 109 Me. 32, 38, 82 Atl. 432; 1901, Mason v. Perry, 22 R. I. 475, 494, 48 Atl. 671.

[17] 1891, Edgerly v. Barker, 66 N. H. 434, 465, 31 Atl. 900, 28 L. R. A. 328.

[18] 1900, Associate Alumni v. General Theological Seminary, 163 N. Y. 417, 57 N. E. 626.

[19] 1858, Beekman v. People, 27 Barb. 260, 291 (affirmed 23 N. Y. 298; 80 Am. Dec. 269).

[20] See Chapter 14, 1911, Louis v. Gaillard, 61 Fla. 819, 843, 844, 56 So. 281; 1912, Lynch v. South Congregational Parish of Augusta, 109 Me. 32, 38, 82 Atl. 432; 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 337, 31 Pac. 436 (Reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44); 1900, Harrington v. Pier, 105 Wis. 485, 503, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[21] 1832, American Academy v. Harvard College, 78 Mass. (12 Gray) 582, 596.

[22] 1910, Allen v. Nasson Institute, 107 Me. 120, 124, 77 Atl. 638.

[23] 1909, Keene v. Eastman, 75 N. H. 191, 193, 72 Atl. 213.

[1] 1890, Penick v. Thom, 90 Ky. 665, 673, 12 Ky. Law. Rep. 613, 14 S. W. 830.

eral,[2] judicial construction,[3] designed to ascertain and carry out, as nearly as possible, the true intention of the donor. Says the Indiana court: "The **cy pres** doctrine of liberal construction will cause courts to be keen to discover whether the main purpose is charity and, if it is, to treat the testator's machinery of administration, not as conditions precedent to vesting, but as suggestions regarding the management."[4] Where, therefore, education is the dominant purpose, a subsidiary direction that all the income of the gift is to be used in paying teachers will be construed to allow expenses for light, heat, repairs and janitor's services to be paid out of the fund.[5] While this American doctrine is narrower than its English cousin, it nevertheless, by stressing the general as against the particular intent of the donor, imparts an elasticity to the law which satisfies in a large measure the requirements of an efficient control over charitable trusts. The difference between it and the English doctrine has been discussed by the courts to the point of satiety.[6]

§ 125. **Valid Gift as a Prerequisite.** This American doctrine cannot be used as a creative force to infuse life into gifts which are void **per se.** It decisively and distinctly presupposes the existence of a valid gift. There must, in every case, be a legal charity properly defined before it can have any application. "It is not the province of the judges to project schemes of charity for insertion in dead men's wills by way of supplement to partial declarations of trust, void on their face for uncertainty."[7] Where, therefore, an indefinite charitable design is clear, but the testator has failed to make the gift to a definite charitable use, the doctrine has no application.[8] Neither does it apply where the donor has sought to confer discretion on trustees to select a non-charitable purpose.[9] Where the gift itself is uncertain, the doc-

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[2] 1889, Adams Female Academy v. Adams, 65 N. H. 225, 226, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785; 1920, Hodge v. Wellman, 191 Iowa 877, 179 N. W. 534.

[3] 1895, Doyle v. Whalen, 87 Me. 414, 426, 32 Atl. 1022, 31 L. R. A. 118.

[4] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 280.

[5] 1906, Tincher v. Arnold, 147 Fed. 665, 673, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[6] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 280.

[7] 1866, Bascom v. Albertson, 34 N. Y. 584, 592.

[8] 1891, Kelly v. Nichols, 17 R. I. 306, 320, 21 Atl. 906, 19 L. R. A. 413.

[9] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 383.

trine has no application even in England. Even prerogative hesitates to take a part of an estate from those who are by law entitled to all that has not been effectually disposed of by the testator.[10]

§ 126. **States in which the Doctrine is not in Force.** It must not be supposed, however, that the doctrine exists in all the states. It can have no existence in such states as have completely abolished the English charity doctrine.[11] Its abolition has, therefore, been vigorously asserted in Wisconsin[12] and New York.[13] And while the doctrine has been restored in New York by the Tilden act, passed in 1893, and amended in 1901 and 1909,[14] and has probably been restored in Wisconsin through the return of that state to the English charity rule,[15] it may confidently be asserted that it is not in force to-day in Virginia, West Virginia, Maryland and Minnesota where the English charity rule has been but very partially resurrected through legislative enactments, nor perhaps in Mississippi where **testamentary** gifts to charity are under the ban of the constitution.[16]

§ 127. **States which have Wavered in Applying the Doctrine.** But even laying to one side the decisions of states which have abolished the English charity rule, considerable contrariety will be found among the states which remain.[17] It must be remembered that, when the courts in America were first confronted with the question, they had a very difficult task on their hands. The English decisions were all that were available as precedents. These made no distinction

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[10] 1861, Beekman v. Bonsor, 23 N. Y. 298, 311, 80 Am. Dec. 269 (affirming 27 Barb. 260).

[11] See Chapter 2.

[12] 1886, Webster v. Morris, 66 Wis. 366, 391, 28 N. W. 353, 57 Am. Rep. 278; 1890, **In re** Fuller, 75 Wis. 431, 435, 44 N. W. 304; 1897, McHugh v. McCole, 97 Wis. 166, 173, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724.

[13] 1866, Bascom v. Albertson, 34 N. Y. 584, 590; 1888, Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, 20 Abb. N. C. 447; 1891, Tilden v. Green, 130 N. Y. 29, 45, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487.

[14] 1916, **In re** MacDowell, 217 N. Y. 454, 465, 112 N. E. 177; 1906, Loch v. Mayer, 100 N. Y. Supp. 837, 50 Misc. Rep. 442. The statute of 1893 alone did not accomplish this result; 1906, Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428.

[15] See 1900, Harrington v. Pier, 105 Wis. 485, 503, 76 Am. St. Rep. 924, 50 L. R. A. 307, 82 N. W. 345. But see 1923, Tharp v. Smith, —— Wis. ——, 195 N. W. 331. For a discussion of these cases see Section 66a, **supra.**

[16] See Section 69-72, **supra.**

[17] See 23 Cent. L. J. 364, 365.

between the **cy pres** power exercised by the chancellor as a judicial officer and as a representative of the crown. Misapprehension and confusion has arisen from this fact.[18] While it was universally felt that the English doctrine was not applicable in its entirety to American conditions, the matter of the proper apportionment caused much difficulty in the earlier cases. While a majority of the courts correctly perceived the distinction between prerogative and judicial powers, others were less keen sighted and more sweeping, and proceeded to eliminate the doctrine altogether, not stopping to winnow the grain from the chaff. Accordingly, the **cy pres** power has been declared, in more or less broad terms, to be nonexistent in Alabama,[19] North Carolina,[20] Tennessee,[21] and Kentucky.[22] Under an ancient statute confining charities to "the true intent and meaning of the grantor, and to no other uses whatever," the doctrine has been totally repudiated in Connecticut as inconsistent with the limited and defined powers of the judiciary,[1] but has been restored by the legislature in 1880 in relation to deeds,[2] and extended by the courts to wills.[3] A somewhat similar development has taken place in Georgia where the legislature[4] has overruled the court.[5] The South Carolina court has held that, where a church cannot take, it does not follow that the court will

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[18] 1899, Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 402, 403, 21 Ky. Law. Rep. 1107, 54 S. W. 200.

[19] 1851, Carter v. Balfour, 19 Ala. 814, 829; 1862, Williams v. Pearson, 38 Ala. 299, 307; 1885, Burke v. Roper, 79 Ala. 138, 143; 1905, Woodruff v. Hundley, 147 Ala. 287, 292, 39 So. 907; 1906, Universalist Convention of Alabama v. May, 147 Ala. 455, 41 So. 515; 1919, Cumberland University v. Caldwell, 203 Ala. 590, 84 So. 846.

[20] 1828, McAuley v. Wilson, 16 N. C. (1 Dev. Eq.) 276, 18 Am. Dec. 587; 1845, Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 30, 44 Am. Dec. 94; 1869, Miller v. Atkinson, 63 N. C. 537, 541; 1899, Keith v. Scales, 124 N. C. 497, 516, 517, 32 S. E. 809; 1921, Wachovia Banking and Trust Co. v. Ogburn, 181 N. C. 324, 107 S. E. 238, 240.

[21] 1893, Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 566, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

[22] 1923, State Bank and Trust Co. v. Patridge, —— Ky. ——, 248 S. W. 1056.

[1] 1852, White v. Fisk, 22 Conn. 31, 54; 1876, Adye v. Smith, 44 Conn. 60, 70, 26 Am. Rep. 424.

[2] 1893, Woodruff v. Marsh, 63 Conn. 125, 136, 26 Atl. 846, 38 Am. St. Rep. 346.

[3] 1894, Hayden v. Connecticut Hospital, 64 Conn. 320, 30 Atl. 50; 1905, Beardsley's Appeal, 77 Conn. 705, 60 Atl. 664; 1923, First Congregational Society of Bridgeport v. Bridgeport, —— Conn. ——, 121 Atl. 77.

[4] 1872, Newson v. Starke, 46 Ga. 88, 92.

[5] 1858, Beall v. Drane, 25 Ga. 430, 442.

divert the legacy to other kindred objects.[6] The question has been placed beyond doubt in Pennsylvania by legislation inaugurated in 1855,[7] under which the indelible stamp of a charitable trust attaches to personal as well as real estate.[8] The aberration of some of these courts has been due, very largely, to broad language used in the earlier cases correctly overruling contentions in favor of the English **cy pres** doctrine, but covering in terms the American doctrine as well. The situation has been well summed up in the following words of a federal court: "While some courts have entirely rejected the rule of **cy pres,** and it has sometimes been characterized, like the evidenciary rule of **res gestae,** as a cloak for loose reasoning, and as a means of interpretation which finds a meaning where none exists; yet its judicial application has usually been most just, enlightened, and beneficial."[9] The matter, however, is now quite generally correctly settled in the various courts.[10] Their tendency toward the American doctrine is so strong that an act of the legislature, passed to enable a charity to be created while the law of the state was still in its infancy, will, if possible, be so construed as not to oust the **cy pres** power of the court.[11]

§ 128. **Reason for Doctrine.** A serious impediment to the effective expansion of charitable endowments, and their easy adaptation to the ever-changing condition of society, would arise from any rule of law which would prevent the establishment of any scheme involving a departure from the specific intentions of a donor, no matter what may be the balance of convenience and advantage in favor of the change. The committee of the society for promoting amendments to the law in England has, therefore, recommended that after thirty years all charities should be made subject

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[6] 1848, Attorney General v. Jolly, 2 Strob. Eq. 379, 395 (S. C.).

[7] 1891, Attorney General v. Pauline Temporary Home, 141 Pa. 537, 21 Atl. 661; 1891, In re Lewis, 11 Pa. Co. Ct. Rep. 561, 568, 1 Pa. Dist. Ct. Rep. 423 (Affirmed 152 Pa. 477, 25 Atl. 878); 1895, Trim v. Brightman, 168 Pa. 395, 31 Atl. 1071. See Sections 86-90, **supra.**

[8] 1895, In re Cowan, 4 Pa. Dist. Rep. 435.

[9] 1906, Tincher v. Arnold, 147 Fed. 665, 673, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[10] See 1881, In re Hinkley, 58 Cal. 457, 512; 1888, Newark v. Stockton, 44 N. J. Eq. (17 Stew.) 179, 191, 14 Atl. 630; 1896, Green v. Blackwell, 35 Atl. 375, 376 (N. J.). See 1856, Brown v. Concord, 33 N. H. 285, 296.

[11] 1899, Lackland v. Walker, 151 Mo. 210, 265, 52 S. W. 414.

to amendment.[12] The American legislatures have not been asked to go to any such extremes, and would probably refuse to do so if requested. There is, however, sound reason for the **cy pres** doctrine so far as it approximates the donor's specific intent in a case where a literal compliance with it has become impractical. Such an approximation is, in fact, coeval with the existence of charitable trusts,[13] and is all that is intended by the American doctrine.[14] This doctrine is reasonable since it allows a well-defined charity to be enforced in favor of the general intent, where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness.[15] Where the original specific purpose of a public charity fails, and there are no objects to which, under the specific terms of the trust, the fund can be applied, the court may, therefore, determine whether or not it was the probable intention of the donor that his gift should be applied to some kindred charity as nearly like the original purpose as possible.[16] Says the New Hampshire court: "The making of a gift for charitable purposes, which is unlimited as to length of time it may continue, presupposes a knowledge on the part of the donor that material changes in the attending circumstances will occur which may render a literal compliance with the terms of the gift impracticable, if not impossible; and it is not unreasonable to infer that under such circumstances the nearest practicable approximation to his expressed wish in the management and development of the trust will promote his intention to make his charitable purpose reasonably effective; for it would be rash to infer that he intended that the trust fund should be used only in such a way that it could not result in a public benefit; in other words, that he wished his general benevolent purpose to be defeated, if his method of administering the trust should become impracticable."[17]

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[12] 1 Am. L. Reg. (N. S.) 129, 462.

[13] 1853, State v. McDonogh, 8 La. Ann. 171, 246.

[14] 1867, Heuser v. Harris, 42 Ill. 425, 436; 1913, People v. Braucher, 258 Ill. 604, 609, 101 N. E. 944, 47 L. R. A. 1015; 1836, Sanderson v. White, 35 Mass. (18 Pick.) 328, 333, 29 Am. Dec. 591.

[15] 1863, Philadelphia v. Girard, 45 Pa. (9 Wright) 9, 28, 84 Am. Dec. 470.

[16] 1895, Doyle v. Whalen, 87 Me. 414, 426, 32 Atl. 1022, 31 L. R. A. 118.

[17] 1909, Keene v. Eastman, 75 N. H. 191, 193, 72 Atl. 213.

§ 129. **What is a valid Approximation?** The question, "what is a valid approximation and what an undue extension?" is obviously involved in great difficulty. To be as near as possible to a thing, it is necessary to remain outside of it.[18] The difficulty is encountered in determining the degree of aloofness. No two cases for the application of the doctrine are identical in their facts. Yet, it is these facts that constitute the controlling element. It follows that the questions which arise are often hard to answer, fraught with great difficulty,[19] and involve a duty of the most solemn nature.[20] "No general rule can be enunciated as to the manner in which the **cy pres** doctrine will be applied. Each case must necessarily depend upon its own peculiar circumstances."[1] The existing decisions, negative and positive, furnish the only **indicia** as to what courts will do in the future.

§ 130. **Illustrations of Refusal to apply the Doctrine.** There is no dearth of decisions which refuse to apply the doctrine to the facts under consideration. Land devised to a church for the support of **its** minister will not be applied to the support of the ministers of other churches of the same denomination, though a surplus of $70,000 has resulted.[2] A charity to an existing school district, made before the education of colored children was legally recognized, may not be used in part for a school district for colored children carved out of it.[3] A bequest for the purpose of alleviating the suffering of "the most prudent of the poor, but not the intemperate," will not be given to a temperance society which incidentally does some poor relief.[4] A gift to an asylum "especially devoted to the care of aged persons" will not be paid to an institution for the relief of "destitute females and helpless children," though some of its inmates are aged women.[5] A donation intended to be limited to no class of indigent persons within a certain area, but to embrace

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[18] 1916, Buckley v. Monck, 187 S. W. 31, 33 (Mo.).

[19] 1908, Richardson v. Mullery, 200 Mass. 247, 250, 86 N. E. 319.

[20] 1899, Lackland v. Walker, 151 Mo. 210, 260, 52 S. W. 414.

[1] 1916, **In re** MacDowell, 217 N. Y. 454, 466, 112 N. E. 177.

[2] 1867, Attorney General v. Reformed Protestant Dutch Church, 36 N. Y. 452 (affirming 33 Barb. 303, 309).

[3] 1884, Leeds v. Shaw, 82 Ky. 79, 6 Ky. Law. Rep. 26.

[4] 1844, **In re** Grandom, 6 Watts & S. 537 (Pa.).

[5] 1885, Succession of Nicholson, 37 La. Ann. 346.

male and female, old and young, married and single, sick and well, Jew and gentile, Catholic and Protestant, Christian and infidel, so far as they are poor, will not be confined to women or those who are sick.[6] A devise for the purpose of erecting a poorhouse will not be applied to a "technological, textile, manual or other school" as a branch of it.[7] A loan to an apprentice, with a provision that the debt thus created shall be canceled if the debtor for five years properly conducts himself, will not entitle his estate to such cancellation where he has died within the five years.[8] A gift to a particular institution, the interest to be paid over to its treasurer solely for its annual running expenses with a forfeiture clause, is consistent only with a particular intent and inconsistent with a general intent, and hence the **cy pres** doctrine is inapplicable.[9] Where the school district legatee is abolished a considerable time before the death of the testator, the court will not substitute its conjecture for the clearly expressed will of the donor which remained unchanged after he had full knowledge of the change of circumstances.[10] Where a fund is donated to a university of the Baptist denomination to be maintained at a certain city, and the university changes its denominational control and there is no other university under the Baptist denomination at such city, the doctrine has no application.[11] A gift of a small farm, of little value, for the purpose of affording relief to women engaged in the straw industry in Massachusetts, which cannot be executed as intended by the donor, and discloses no general charitable intent, will not be executed **cy pres.**[12]

§ 131. **Illustration of the Application of the Doctrine.** It is not, however, the negative, but rather the positive side of the matter which chiefly interests litigants, attorneys and courts. It is clear that if a person "directs by will that a hospital shall be erected, and specifies that certain materials be used or a certain architect be employed, he intends, unless

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[6] 1900, Ford v. Thomas, 111 Ga. 493, 505, 36 S. E. 841.

[7] Ford v. Thomas, **supra.**

[8] 1865, Smith Charities v. Northampton, 92 Mass. (10 Allen) 498, 502.

[9] 1920, Bancroft v. Maine Sanitarium Ass'n, 119 Me. 56, 109 Atl. 585, 592.

[10] 1897, Brooks v. Belfast, 90 Me. 318, 332, 38 Atl. 222.

[11] 1920, Curtis and Barker v. Central University, 188 Iowa 300, 176 N. W. 330.

[12] 1917, Gilman v. Burnett, 116 Me. 382, 102 Atl. 108.

he expressly states otherwise, that, in case the specified materials cannot be obtained, others shall be substituted, and that in case the architect named shall be dead or unable to act, some other architect may be employed.''[13] Therefore, a gift to a life-saving station has, after its rejection by the United States, been applied to the purpose of pensioning life savers, thus making the dangerous service more attractive.[14] A charity to provide premiums to persons who make valuable contributions to a certain branch of science has been used for the purchase of books, papers, and apparatus and for publications, lectures, experiments and investigations which deal with such subjects.[15] Shortly after the Civil War, a bequest for the purpose of creating a sentiment against negro slavery was applied to the use of necessitous colored people in Boston and vicinity, while a similar gift by the same testator in favor of fugitive slaves was paid to the treasurer of a branch of the American Freedmen's Union Commission.[16] A donation for a free bed at a public insane asylum has been construed as showing a general intent to benefit insane patients at such hospital,[17] while a like gratuity to a hospital which had lost its property, has been executed by the establishment of a free bed in another institution.[18] Similarly, gifts to a hospital which refused the charity,[19] or could not be established,[20] or has gone out of existence at the time of the testator's death,[21] have been carried out through other hospitals. A devise with power to sell and expend the proceeds ''for other lot or lots'' has, where such reinvestment had proved to be a burden rather than a benefit, been construed as authorizing a sale and the use of the money realized for the general purposes of the donee.[22] Though the testator had contemplated that his charity was to be administered by a corporation, or by a corporation to be char-

[13] 1915, Brown v. Condit, 70 N. J. Eq. 440, 445, 61 Atl. 1055.

[14] 1908, Richardson v. Mullery, 200 Mass. 247, 250, 86 N. E. 319.

[15] 1832, American Academy v. Harvard College, 78 Mass. (12 Gray) 582.

[16] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 597, 598.

[17] 1894, Hayden v. Connecticut Hospital, 64 Conn. 320, 30 Atl. 50.

[18] 1913, Rhode Island Hospital Trust Co. v. Newport, 87 Atl. 182 (R. I.).

[19] 1913, Read v. Willard Hospital, 215 Mass. 132, 102 N. E. 95.

[20] 1911, Adams v. Page, 76 N. H. 96, 98, 79 Atl. 837.

[21] 1923, In re Mill's Will, 200 N. Y. Supp. 701, 121 Misc. 147.

[22] 1915, In re Franklin Street M. E. Church, 249 Pa. 275, 95 Atl. 89.

tered by special act, it has, nevertheless, been executed in the first case by other appropriate means,[23] and in the other by a corporation created under general laws.[24] Money left to erect a wing to a home at a certain place has, after the home had been removed to another locality, been used to erect the wing there.[25] A donation for a university to teach the doctrine of the new Jerusalem, as laid down by Swedenborg, has been applied to a university founded by a section of Swedenborgians which arose after the testator's death.[1] A gift to the hose company of a village has, when the village had become a city, been devoted to its protection from fire.[2] A bequest of $5,000 for a mausoleum on testator's lot, which is impossible because of the rules of the cemetery, has been executed by appropriating $1,500 for an underground vault.[3] A gift of $50,000 for the construction of a fireproof building has, where the advances in cost had made such a building impossible except at a higher rate, been carried out by making the $50,000 merely a part of the building fund.[4] Where a direction **annually** to use the income of a fund for library purposes had not been carried out for years on account of protracted litigation more than doubling the principal, such accumulated interest has been added to the principal, and the increased interest has been directed to be expended annually.[5]

§ 132. **General and Special Intent.** A sharp distinction must be made between the donor's general intent and any special intent expressed by him. Such general intent is concerned with the gift itself, while the special intent relates to the manner of its execution. "In all gifts for charitable uses, the law makes a very clear distinction between those parts of the writing conveying them, which declare the gift

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[23] 1905, Codman v. Brigham, 187 Mass. 309, 313, 72 N. E. 1008, 105 Am. St. Rep. 394.

[24] 1877, Cory Universalist Society v. Beatty, 28 N. J. Eq. (1 Stew.) 570 (affirmed 31 N. J. Eq. 796).

[25] 1910, Avery v. Home for Orphans of Odd Fellows of Pennsylvania, 228 Pa. 58, 77 Atl. 241.

[1] 1910, Kramph's Estate, 228 Pa. 455, 77 Atl. 814.

[2] 1919, Sherman v. Richmond Hose Co., 175 N. Y. Supp. 8, 186 App. Div. 417.

[3] 1917, In re Brundage, 167 N. Y. Supp. 694, 699, 101 Misc. 528 (affirmed 175 N. Y. Supp. 37, 186 App. Div. 722).

[4] 1920, Christian v. Catholic Church of St. John, 91 N. J. Eq. 374, 110 Atl. 579.

[5] 1920, Hartman v. Pendleton, 96 Ore. 503, 190 Pac. 339.

and its purposes, and those which direct the mode of its administration."[6] This distinction is peculiar to charitable trusts. "In carrying into execution a bequest to an individual, the mode in which the legacy is to take effect is deemed to be of the substance of the legacy; but, when the legacy is to charity, the court of chancery will consider charity as the substance."[7] The distinction is akin to that between substance and its incidents, on the one hand, and forms, or rules of administrative details, on the other; or, stated in another manner, the difference is between an end in view and the means for its accomplishment.[8] When such general intent is reasonably clear, and is consistent with the rules of law, it will not be defeated by any inaccuracy or inconsistency in the expression of the particular intent,[9] or even by an entire failure to point out the mode of application.[10] A clause in a will which provides for a plan to be hereafter devised, therefore, indicates a general charitable intent to which the particular mode is subordinate,[11] and will be enforced even though the codicil, which is to incorporate the plan, is never executed.[12] Where the main purpose of a testator is charity, directions for the erection of a hotel and the accumulation of one-half of the income will be treated as the means or mode of management, not as the end or purpose.[13]

§ 133. **Difficulty in distinguishing General and Special Intent.** It is, of course, sometimes difficult to determine which is the general and which the special intent. A greater definiteness on the part of testators certainly would be desirable. Ordinarily, the courts must determine the question as best they can. A dominant intent to benefit the people of a parish has accordingly been read out of a gift to a church which was to be known by testator's name, and which was

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[6] 1863, Philadelphia v. Girard, 45 Pa. (8 Wright.) 9, 25, 84 Am. Dec. 470.

[7] 1867, Heuser v. Harris, 42 Ill. 425, 434; 1909, Klumpert v. Vrieland, 142 Iowa 434, 439, 121 N. W. 34; 1920, Jansen v. Godair, 292 Ill. 364, 127 N. E. 97, 101.

[8] 1899, Lackland v. Walker, 151 Mo. 210, 249, 52 S. W. 414.

[9] 1905, Beardsley's Appeal, 77 Conn. 705, 711, 60 Atl. 664.

[10] 1856, Derby v. Derby, 4 R. I. 414, 437.

[11] 1900, Sherman v. Congregational Home Missionary Society, 176 Mass. 349, 57 N. E. 702.

[12] 1921, In re Barnwell, 269 Pa. 443, 112 Atl. 535.

[13] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 280.

to contain a tablet which was to commemorate this fact "and that I have so done that the memory of myself, my late wife, and my family shall be perpetuated in said parish, and it is my hope that the gift shall prove a lasting benefit to the people of the parish for many generations."[14]

§ 134. **Special Intent becoming impossible.** It is the special, and not the general, intent which will ordinarily come into conflict with changed conditions. The more minute the provisions laid down by the testator are, the quicker will this result come to pass. There can be no question, however, that the testator, if living, would make the necessary changes in the details of his plan. The situation is very much the same as develops in connection with the written law. Statutes passed after the most mature consideration by private individuals, public officials, legislative committees and the legislature itself, will not very often remain unamended for any great length of time. While their general policy may remain unchanged, their administrative details will require many alterations to adapt them to changing conditions. What is true of a statute on which many keen minds have centered their criticism, both constructively and destructively, certainly holds good in regard to a will which has not undergone such a test. A donor, actuated by the best intentions, will make many mistakes where he gives detailed directions, particularly when the proposed charity extends far into the future, when many changes in this ever-changing country have taken place.[15] No greater wrong, however, could be done to him than by defeating his clearly expressed general intention on the ground that he has misconceived the practicability of the means which he has prescribed to carry that intention into execution.[16] It would be doing great injustice to his memory "to interpret his purpose so narrowly as to make the continuance or the success of his charity dependent upon the ability of the trustees to observe all the details of

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[14] 1917, Gagnon v. Wellman, 78 N. H. 327, 99 Atl. 786. Similarly, in a gift for a monastery, the monastery has been held to be merely the means through which the spiritual benefit intended by the testator is to be achieved; 1921, Dupont v. Pelletier, 120 Me. 114, 113 Atl. 11, 13.

[15] 1857, McCaughal v. Ryan, 27 Barb. 376, 381 (N. Y.).

[16] 1893, Crerar v. Williams, 145 Ill. 625, 653, 34 N. E. 467, 21 L. R. A. 454 (affirming 44 Ill. App. 497).

administration which the will outlines.''[17] Such directions where they are not intended to be limitations will, therefore, not be regarded as mandatory,[18] and the trust will not be allowed to fail because they cannot be literally executed.[19] Where a city has no power to buy a lot, and a gift is made to it on condition that it furnish such lot, such condition may be satisfied by the voluntary action of its private citizens. The bequest will not be held void, because the testator has mistakenly contemplated an act beyond the power of the city.[20] Similarly, where a testator requires the city depository to pay six per cent annually to the trustees of the charity, and the city cannot realize such interest by investment, and has no power to pay public money to the trustees, the dominant purpose of the testator to benefit worthy boys will be carried out, and the direction as to the interest will be treated merely as an estimate. The impossible obligation sought to be imposed on the city, being repugnant to the paramount and over-balancing design to establish the charity, yields to that supreme overruling purpose.[21] A gift to a mission board which, before the war, maintained various charitable enterprises in Armenia, and which gift is expressly limited to the support of such enterprises, does not fail by reason of the difficulties brought about by the war and its aftermaths, but will, if it is eventually found to be impossible in its present form, be carried out **cy pres.**[22]

§ 135. **General Intent carried out over Special Intent.** It is obvious that a slavish adherence to the details of a testator's plan would, in time, destroy almost every charity, though it was intended to benefit all future generations.[23] Without large discretionary powers to vary the details of administration, ''many charities would fail by change of circumstances and the happening of contingencies which no human foresight could provide against; and the probabilities

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[17] 1899, Lackland v. Walker, 151 Mo. 210, 260, 52 S. W. 414.

[18] 1906, Tincher v. Arnold, 147 Fed. 665, 673, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[19] 1892, Barkley v. Donnelly, 112 Mo. 561, 574, 19 S. W. 305.

[20] 1898, Grand Prairie Seminary v. Morgan, 171 Ill. 444, 553, 49 N. E. 516 (affirming 70 Ill. App. 575).

[21] 1923, Attorney General v. Lowell, —— Mass. ——, 141 N. E. 45, 48.

[22] 1923, In re Donchian's Estate, 199 N. Y. Supp. 107, 120 Misc. 535.

[23] 1903, Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11, 22, 23, 55 Atl. 468.

of such failure would increase with the lapse of time."[24] Minor details must, therefore, not be allowed to defeat a charity if it is possible to carry out the general intention.[1] Where circumstances have changed, courts must look through the mere words of a donation to its spirit and inquire what the donor would direct if he were living.[2] The main intention must be carried out, not defeated, by a literal compliance with all the expressed terms of the gift.[3] In doing this, considerable flexibility must be allowed as to the details.[4] The natural order of things must not be inverted by subordinating principles to form, purposes to means, and the actual and executed gifts for a known purpose to the prescribed and vaticinated modes of administering them.[5] The form of a charity may, therefore, be molded to suit the necessities of changed conditions and surroundings.[6] "While the specific trust has failed through the lack of prophetic vision in its creator, the charitable purpose, which had its birth in the conscience of the founder, remains, and appeals to equity, to prevent the defeat of the benevolent intention, which oftentimes originates in a moral impulse higher than the origin of mere municipal law."[7]

§ 136. **General Intent incapable of Accomplishment. Fraud.** It must be clear that the trust is void where the general purposes of the testator cannot be achieved, whether this is due to illegality or any other impediment. It has, therefore, been held that when the land contemplated as the basis of the charity, and the fund to endow it have been fraudulently acquired by the testator, and have been restored to their rightful owner, the general purpose cannot be accomplished though a small sum, which actually belonged to the testator, remains.[8]

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[24] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 580.

[1] 1898, Grand Prairie Seminary v. Morgan, 171 Ill. 444, 450, 49 N. E. 516 (affirming 70 Ill. App. 575).

[2] 1867, McIntire v. Zanesville, 17 Ohio St. 352, 363.

[3] 1909, Keene v. Eastman, 75 N. H. 191, 194, 72 Atl. 213.

[4] 1912, Mars v. Gibert, 93 S. C. 455, 466, 77 S. E. 131.

[5] 1863, Philadelphia v. Girard, 45 Pa. (9 Wright) 9, 25, 84 Am. Dec. 470; 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 209, 79 S. W. 831.

[6] 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 123, 48 S. W. 960; 1899, Lackland v. Walker, 151 Mo. 210, 248, 52 S. W. 414.

[7] 1916, Buckley v. Monck, 187 S. W. 31, 33 (Mo.).

[8] 1916, In re Lyon, 159 N. Y. Supp. 951.

§ 137. **Conflict between the two Intents.** The general and special intents sometimes come into direct conflict. The course of the courts in such a case is clear. Where letter and spirit clash, the letter must yield to the spirit, not the spirit to the letter.[9] Where the particular is inconsistent with the general intent, the latter will be carried out at the expense of the former.[10] "Where the donor had two objects in view—one primary or general, and the other secondary or particular—and these are, literally speaking, incompatible, the particular object must be sacrificed in order that effect may be given to the general object, according to law 'and as near as may be' to the testator's or donor's intention."[11] Where, therefore, a testator's two directions, 1, that the **whole** of a certain income be applied to the aid of indigent students of theology at Cambridge, 2, that no one beneficiary receive more than $150 annually, cannot both be carried out because there are not enough such students at Cambridge to absorb the whole income, the principal object of the testator will be carried out by increasing the amount to be paid to the beneficiaries.[12]

§ 138. **Illustrations of Special Intent.** It is a very easy matter to further illustrate this distinction. Nor is it necessary to draw on the imagination. It has been held that where an investment of a charitable fund in certain state bonds,[13] or in the stock of a certain company,[14] is directed, and such investment has become impracticable, the general charitable intent will not fail merely because it is coupled with a particular or subsidiary intent which cannot be carried out. Similarly, the particular institution through which a charity is to be carried into effect,[15] the time within which

[9] 1906, Crow v. Clay County, 196 Mo. 234, 279, 280, 95 S. W. 369.

[10] 1902, In re Long, 204 Pa. 60, 53 Atl. 497.

[11] 1910, Brice v. All Saints Memorial Chapel, 31 R. I. 183, 202, 76 Atl. 774.

[12] 1883, Society for Promoting Theological Education v. Attorney General, 135 Mass. 285. Compare 1919, Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699, where the testator contemplated the support of only one student at a time, but the income becoming too large, a second student was made a beneficiary.

[13] 1884, Pell v. Mercer, 14 R. I. 412, 431.

[14] 1867, McIntire v. Zanesville, 17 Ohio St. 352, 354, 362, 363.

[15] 1890, Penick v. Thom, 90 Ky. 665, 14 S. W. 830, 12 Ky. Law. Rep. 613; 1887, Succession of Vance, 39 La. Ann. 371, 373, 2 So. 54; 1871, In re Heddleson, 8 Phila. 602, 603 (Pa.); 1893, Barnard v. Adams, 58 Fed. 313, 317.

it is to be established,[16] its site[17] or the control by the inhabitants of a certain place,[18] and the place of sale of certain property with the proceeds of which the charity is to be conducted,[19] have been held to be administrative details which may be molded by equity to fit in with the general intent of the donor. Where a donor makes a gift for the adornment and improvement of a cemetery in which he desires to be buried, and such cemetery is abandoned and his body is removed to another cemetery, his main intention that the cemetery in which he is buried shall be benefited, will be carried out by a **cy pres** application of the gift.[20] Where a college invites a $50,000 donation and agrees to change its name so as to perpetuate the name of the donor, the desire to perpetuate such name will not be held to be the dominant intent, after the college has merged with another, where the donor has expressed his appreciation of Christian education, has commended the success of the college, and has made his gift on condition that an additional $100,000 be raised.[21]

§ 139. **Donor's General Intent not to be subverted.** This process, however, will not be carried so far as to subvert the donor's general intent. The courts cannot devote any portion of a fund dedicated to charitable uses to an object not contemplated by the donor.[22] Their power is derived from the same source whence the authority of the trustees originates, and hence the directions of the donor must be adhered to as rigidly by the courts as by the trustees.[1] Courts, in applying the American **cy pres** doctrine, therefore, act "within the donor's charitable purpose, and not beyond it, or alongside of it, or next to it."[2] Their power to administer the trust and direct its objects must find its warrant in the intentions of the testator as expressed

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[16] 1905, Beardsley's Appeal, 77 Conn. 705, 60 Atl. 664.

[17] 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 339, 84 N. E. 256, 122 Am. St. Rep. 169; 1918, Toner's Estate, 260 Pa. 49, 103 Atl. 541.

[18] 1893, Sears v. Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502.

[19] 1914, Case v. Hasse, 83 N. J. Eq. 170, 176, 93 Atl. 728.

[20] 1922, McElwain v. Allen, 241 Mass. 112, 134 N. E. 620.

[21] 1922, Lupton v. Leander Clark College, 194 Iowa 1003, 187 N. W. 496.

[22] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 339, 31 Pac. 436 (Reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44).

[1] 1913, Morris v. Boyd, 110 Ark. 468, 476, 162 S. W. 69.

[2] 1905, Brown v. Condit, 70 N. J. Eq. 440, 446, 61 Atl. 1055.

in the will.[3] The purpose of the donor must not be changed, but at most the manner in which it is to be achieved.[4] A general intent must be found in any case before any **cy pres** application will be directed.[5]

§ 140. **Donor's Intent the Pole Star.** The testator's intention is thus the one controlling factor. It is the trail which the courts must follow in all its turns and windings, through swamps and over hills, provided only that it has been sufficiently blazed and does not trespass on forbidden territory. Courts may, therefore, define, but not enlarge, the powers conferred upon the trustee.[6] They will look to the conveyance which the donor has made, the objects which they are fitted to accomplish, and the agencies whose employment he has directed, and will endeavor to frame them into a consistent and harmonious plan in accordance with his leading intention.[7] They will exercise great vigilance to see that no change is made, either in the application of the charity, or in its management that would be in conflict with his declared intention.[8] Where it is not only possible, but practicable, to build such a system of water-works as is essential for "the establishment and erection of a hydrant, or fountain, for supplying pure, fresh, cool drinking water for all passers-by," the charity will not be executed **cy pres** by digging cisterns or sinking wells at one or more places on the public streets.[9] A gift to educate some one of the donor's grandnephews (in the order named by him) for the priesthood will not be executed by educating some other individual.[10]

§ 141. **Difficulties in distinguishing between the two Intents.** The difficulties in the way of determining the presence or absence of a general intention, of defining the boundary line between a general and a special intention, and sometimes even of determining whether an intent is general

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[3] 1870, Rotch v. Emerson, 105 Mass. 431, 433.

[4] 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 121, 122, 48 S. W. 960.

[5] 1912, Quimby v. Quimby, 175 Ill. App. 367, 371.

[6] 1913, Morris v. Boyd, 110 Ark. 468, 476, 162 S. W. 69.

[7] 1853, McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 403, 14 L. Ed. 732.

[8] 1855, Harvard College v. Society for Promoting Theological Education, 69 Mass. (3 Gray) 280, 281.

[9] 1891, Roach v. Hopkinsville, 13 Ky. Law. Rep. 543.

[10] 1837, In re Flaherty, 2 Pars. Eq. Cas. 186 (Pa.).

or special, are considerable. Testators and their attorneys do not ordinarily distinguish in terms between the two intentions. Cases, where the testator himself directs a **cy pres** application of his gift by providing that on the failure of his specific purpose the property is to be devoted "to such uses as will most nearly accomplish the object desired,"[11] are rare indeed. Courts are, therefore, ordinarily obliged to look at the whole will in all its details, and beyond it to the situation out of which it has arisen, to determine whether or not the donor had any general intention. Such intention is, of course, excluded where the gift is expressly limited to some narrow charitable purpose,[12] such as the establishment and maintenance of a room for the preservation and exhibition of works of art and other relics left by the testator,[13] particularly where there is a limitation over.[14] Where the donor's language clearly shows an intention that the gift be administered by a trustee and the income only be turned over to the institution to be benefited, the principal will not be paid to the institution, though the original trustee is dead and his successor joins in the prayer.[15] However, the limitation of the gift to the support of a school, and that a school in which tuition must be free, does not so specifically define and circumscribe the devise as to indicate an absence of a general intent.[16]

§ 142. **Cases in which no General Intent will be deduced.** The absence of a general intent is quite frequently deduced from the form which the gift has taken, or from the circumstances under which it was made, or from both taken together. No general intent will be implied where nothing but a special intent is manifested. A gift made for a memorial purpose must, therefore, be devoted to a monument and will not be executed **cy pres.**[17] Money to be used **wholly** for poor

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[11] 1896, Christ Church v. Trustees of Donations and Bequests, 67 Conn. 554, 567, 35 Atl. 552.

[12] 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 325, 71 Atl. 1032; 1889, Peter v. Carter, 70 Md. 139, 16 Atl. 450.

[13] 1908, Gill v. Attorney General, 197 Mass. 232, 235, 83 N. E. 676.

[14] 1912, Bragg v. Litchfield, 212 Mass. 148, 151, 98 N. E. 673.

[15] 1915, Unruh's Estate, 248 Pa. 185, 93 Atl. 1000.

[16] 1918, Laswell v. Hungate, 256 Fed. 635, 168 C. C. A. 29. (Certiorari denied 249 U. S. 612, 63 L. Ed. 801, 39 S. Ct. 386.)

[17] 1869, Brown v. Meeting Street Baptist Society, 9 R. I. 177, 187.

children will not be diverted to the support of the public schools which serve rich and poor alike.[18] Funds donated to establish a school to take the place of an academy, which had been removed to another location against the wishes of the testator, will not be applied to the support of such academy.[19] Gifts to maintain a long established hospice for traveling friends,[20] or to buy a fire truck and its accompaniments,[1] will not be executed by devoting the property in the first case to the benefit of a religious society, and in the second by buying a bell to call the firemen together. Where the testator merely intends to help a municipality to erect a building "for the sick and the poor, those without homes," no general intent to help the sick and the poor will be deduced.[2]

§ 143. **A General Intent must be indicated.** No words expressly or impliedly negativing a general intent need be found in a will. It is sufficient if there are no words in it which positively show the presence of such general intent.[3] "Assuming that the object is a charity, still there is no universal principle that the testator's particular intention must be sacrificed by reason of that general object."[4] If the will is silent as to any general intent, the court is not justified in substituting for it its arbitrary conjecture.[5] A general intent is even excluded where the provision for the reception of a certain class of beneficiaries is very explicit, while the reference to the poor generally is very vague.[6]

§ 144. **Religious Charities.** Religious charities usually run in denominational channels, and are, therefore, inherently the outcome of a special rather than of a general inten-

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[18] 1867, McIntire v. Zanesville, 17 Ohio St. 352, 363.

[19] 1889, Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785.

[20] 1892, Kelly v. Nichols, 18 R. I. 62, 67, 25 Atl. 840, 19 L. R. A. 413.

[1] 1876, Harrisburg v. Hope Fire Co., 2 Pears. 269, 272 (Pa.).

[2] 1908, Bowden v. Brown, 200 Mass. 269, 86 N. E. 351, 128 Am. St. Rep. 419.

[3] 1912, Quimby v. Quimby, 175 Ill. App. 367, 373.

[4] 1891, Bullard v. Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110. Cited with approval, 1897, Teele v. Bishop of Derry, 168 Mass. 341, 242, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401.

[5] 1904, Gladding v. St. Matthews Church, 25 R. I. 628, 639, 57 Atl. 860, 65 L. R. A. 225, 105 Am. St. Rep. 904.

[6] 1891, Kelly v. Nichols, 17 R. I. 306, 323, 21 Atl. 906, 19 L. R. A. 413.

tion.[7] A general intent may be absent in such a gift, even though the testator uses numerous pious expressions and shows great ardor for what he conceives to be the truth.[8] A Baptist will ordinarily seek to benefit Baptist organizations, and a Methodist, Presbyterian, and Catholic will act on the same principle. A person who has no preference for any denomination will ordinarily donate to educational or eleemosynary, rather than to religious charities. The funds of a defunct Universalist church will, therefore, not be appropriated to some other church inculcating different beliefs.[9] Where the purpose of the testator is to effect a union between two local churches, and this has become impossible by the refusal of one of them, the gift will not be executed in favor of the other.[10] Religious charities, however, are not only circumscribed by denominational boundaries, but are frequently even narrower in scope. It has, therefore, been held that a gift for the **erection** of a certain church building will not be diverted to the erection of another church of the same faith, or to the payment of the expenses of the existing church.[11] Neither will it be used to repair the existing church building, or to build a parish house, or to enlarge the parish graveyard.[12] A donation to a local church will not be turned over to the general church of which the local church is a part.[13] Where a railroad village had sprung up some distance from a church, its removal to such village over the protest of a minority has been held to be a breach of trust.[14]

§ 145. **Gift to defunct Corporation.** The presence or absence of a general intent is particularly important where a gift has been made to a defunct corporation. In this age of combinations, not only the commercial, but even the char-

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[7] 1872, Pringle v. Dorsey, 3 S. C. 502, 508.

[8] 1892, Kelly v. Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

[9] 1913, People v. Braucher, 258 Ill. 604, 610, 101 N. E. 944, 47 L. R. A. 1015. See 1843, Second Congregational Society v. First Congregational Society, 14 N. H. 315, 330.

[10] 1828, McAuley v. Wilson, 16 N. C. (1 Dev. Eq.) 276, 18 Am. Dec. 587.

[11] 1857, Wilson v. Lynt, 30 Barb. 124, 132 (N. Y.).

[12] 1897, Teele v. Bishop of Derry, 168 Mass. 341, 344, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401. But see 1913, St. James Church v. Wilson, 82 N. J. Eq. 546, 89 Atl. 519 (affirmed 83 N. J. Eq. 324, 91 Atl. 101).

[13] 1906, Universalist Convention v. May, 147 Ala. 455, 41 So. 515.

[14] 1885, McRoberts v. Moudy, 19 Mo. App. 26.

itable work of the world is largely carried on by corporations. Devises and bequests to religious, eleemosynary, and educational institutions, incorporated under the laws of the various states, are the order of the day. Frequent changes, however, occur among these artificial entities. The life of many of them is limited, while not a few, even though they may be unlimited by law, meet a violent or a natural death without realizing the fond hopes of their founders. Others, finding that they are too weak to successfully carry on their work, effect a union with some stronger body, and thus, in a measure, achieve the purpose for which they are founded. While this process is going on, devises and bequests to such bodies are executed, but quite frequently do not become effective until after the process has been completed. What is to become of such gifts? They cannot be executed according to their letter, since the donee has ceased to exist. If they are to be carried out at all, the **cy pres** doctrine must be invoked.

§ 146. **Gift to Corporation. Absence of General Intent.** This brings us back to the general intent. Where the testator intended to benefit only the particular corporation, any general intent is excluded, and the gift is defeated and will not be carried out **cy pres.** Thus, a gift to a society for providing medical attendance to worthy poor,[15] or to benefit needy boys and girls,[16] has fallen to the ground by the dissolution of the corporation. The same has been held where the beneficiary had consolidated with another corporation.[17] Says the Massachusetts court: "If the charitable purpose is limited to a particular object, or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of **cy pres** does not apply, and in the absence of any limitation over or other provision, the legacy lapses."[18] Money left to a library asso-

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[15] 1913, Morristown Trust Co. v. Morristown, 82 N. J. Eq. 521, 91 Atl. 736.

[16] 1912, Quimby v. Quimby, 175 Ill. App. 367, 372. But see 1907, Hubbard v. Worcester Art Museum, 194 Mass. 280, 290, 60 N. E. 490.

[17] 1904, Gladding v. St. Matthews Church, 25 R. I. 628, 57 Atl. 860, 65 L. R. A. 225, 105 Am. St. Rep. 904.

[18] 1897, Teele v. Bishop of Derry, 168 Mass. 341, 343, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401.

ciation after the dropping of a life estate, therefore, has not been allowed to accrue to another library association to which the beneficiary had conveyed its rights before surrendering its charter, though an act to that effect had been passed by the legislature.[19] Where a trust was limited to a particular corporation which was not intended as a mere conduit, the extinction of such corporation by the transfer of its property to the state has been held to bring about a failure of the trust.[20]

§ 147. **Gift to Corporation. Presence of General Intent.** The situation is different where such general intent is present. In such case, the dissolution of the donee, or its union with another corporation, is of no consequence. The general intention is an active power which moves the courts to enforce it.[21] Gifts to defunct Bible societies,[22] educational institutions,[1] and hospitals,[2] have, therefore, been upheld. Gifts to a library,[3] a school,[4] a voluntary fire company,[5] and a church society,[6] have been vested in the body which had succeeded the donee. In a Florida case, a gift to a co-educational institution has been vested in its successor, though such successor confined its activities to one sex.[7] Where a college was too weak to continue its activities, the court has applied the **cy pres** doctrine to an endowment fund held by it, and has given such fund to the institution with which the college effects a merger.[8]

§ 148. **Reverter Clause. Importance.** The presence or

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[19] 1919, Wright v. Wright, 225 N. Y. 329, 122 N. E. 213.

[20] 1920, Bancroft v. Maine Sanitarium Ass'n, 119 Me. 56, 109 Atl. 585, 591.

[21] 1872, Goode v. McPherson, 51 Mo. 126, 127 (Citing 1872, Academy of the Visitation v. St. Clemens, 50 Mo. 167); 1922, **In re** Scrimger, 188 Cal. 158, 206 Pac. 65, 69. But see 1922, Trustees of Presbyterian Church v. Katsianis, —— Ind. App. ——, 134 N. E. 684, 686.

[22] 1848, Winslow v. Cummings, 57 Mass. (3 Cush.) 358; 1861, Bliss v. American Bible Society, 84 Mass. (2 Allen) 334.

[1] 1912, Lynch v. South Congregational Parish of Augusta, 109 Me. 32, 39, 82 Atl. 432.

[2] 1906, Nichols v. Newark Hospital, 63 Atl. 621 (N. J.).

[3] 1909, Mason v. Bloomington Library Ass'n, 237 Ill. 442, 449, 86 N. E. 1044 (reversing 143 Ill. App. 39).

[4] 1914, Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 730, 175 S. W. 571.

[5] 1921, Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613, 616; 1913, Bridgeport Trust Co. v. Marsh, 87 Conn. 384, 397, 87 Atl. 865.

[6] 1860, De Witt v. Chandler, 11 Abb. Prac. 459 (N. Y.).

[7] 1911, Louis v. Gaillard, 61 Fla. 819, 841, 56 So. 281.

[8] 1922, Lupton v. Leander Clark College, 194 Iowa 1008, 187 N. W. 496.

absence of a reverter clause is an important consideration. The presence of such a clause shows clearly that the testator contemplated the possible lapse of his gift,[9] while its absence is evidence, though negative in character, of the existence of a general intent.[10] Where, therefore, there is no reverter clause, and the particular intent cannot be accomplished, the court will seek for a general intention and carry it into execution.[11] It follows that, in the absence of a reverter clause, a gift by a local contributor to the endowment fund of a local college will inure to the institution, even though such institution is located in another city.[12] The same result will be accomplished even where there is a reverter clause not applicable, however, to the facts presented.[13]

§ 149. **Reverter without Reverter Clause.** It must not be supposed, however, that there can be no reverter without a reverter clause. Some courts indeed have taken the position that once a gift is vested in charity it cannot find its way back to the heirs.[14] This is an extreme view which has not found a large following. "The present trend is most distinctly toward maintaining the doctrine of lapse as against the exercise of a judicial **cy pres** power based upon intentions of charitable donors established by uncertain inferences which often amount to mere assumptions, if not fictions."[15] If the intention of the donor can be legally executed, whether the gift is to a general charity or specific object, it will be done; but if this is impossible, the claim of the heirs will not be defeated by appropriating the property to another and different object.[16] Where, therefore, the trust cannot be administered because of the failure of the designated trustee, and no other trustee can be found, the gift must revert to

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[9] 1923, Bristol Baptist Church v. Connecticut Baptist Convention, 98 Conn. 677, 120 Atl. 497, 500.

[10] 1909, Keene v. Eastman, 75 N. H. 191, 193, 72 Atl. 213; 1923, First Cong. Soc. of Bridgeport v. Bridgeport, —— Conn. ——, 121 Atl. 77, 81.

[11] 1916, Winslow v. Stark, 78 N. H. 135, 97 Atl. 979.

[12] 1919, Starr v. Morningside College, 186 Iowa 790, 173 N. W. 231.

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[13] 1910, Brice v. All Saints Memorial Chapel, 31 R. I. 183, 76 Atl. 774.

[14] 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 126, 48 S. W. 960. See Chapter 15.

[15] 1905, Brown v. Condit, 70 N. J. Eq. 440, 453, 61 Atl. 1055.

[16] 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 369, s. c. 4 Iowa 252; 1906, Hunt v. Edgerton, 29 Ohio Circuit Ct. Rep. 377, 383, 19 Ohio Cir. Ct. Dec. 377 (affirmed 75 Ohio St, 594, 80 N. E, 1126),

the donor.[17] Where a gift is given to six charitable beneficiaries, share and share alike, and the gift to one of them fails, such share will go to the heirs and not to the remaining five.[18] A charity to an unincorporated church society reverts to the heirs where the church has been dissolved and its members have dispersed and scattered, though another church under the same name has since been organized.[19] A gift "to the hospital fund for sick seamen at Navy Yard, Brooklyn, N. Y., care of Mr. John M. Wood, chaplain," lapses where there is no such fund and the person named has died before the testator and was never a chaplain.[20]

§ 150. **Alternative Provision.** No general intention will be deduced by the courts and made the basis of a **cy pres** application, where the testator himself makes provision for a **cy pres** application, by making his gift in the alternative,[21] so that if the first fails the second goes into effect,[22] and prevents a reversion to the heirs,[23] and if both the first and second fail, the third (if any) comes into force.[1] Under such a provision, a trust will not be declared impossible of accomplishment until all the alternatives have been tried and found wanting.[2] The clearly expressed intention of the testator, that no **cy pres** application is to be made of any except possibly the last alternative, will be carried out to the letter,[3] for the reason that the donor, by his alternative provisions, has actually done what the court would do under the **cy pres** power.[4] Where a testatrix creates a trust in the alternative, and the trustee first named accepts and administers the trust

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[17] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 795.

[18] 1915, Volunteers of America v. Peirce, 267 Ill. 406, 108 N. E. 318 (reversing 187 Ill. App. 428).

[19] 1872, Pringle v. Dorsey, 3 S. C. 502, 508.

[20] 1905, Brown v. Condit, 70 N. J. Eq. 440, 61 Atl. 1055.

[21] 1897, Sickles v. New Orleans, 80 Fed. 868, 873, 26 C. C. A. 204.

[22] 1889, Cruikshank v. Home for the Friendless, 113 N. Y. 337, 353, 21 N. E. 64, 4 L. R. A. 140; 1830, Inglis v. Sailor's Snug Harbor, 28 U. S. (3 Pet.) 99, 113, 114, 7 L. Ed. 617; 1886, Webster v. Morris, 66 Wis. 366, 394, 28 N. W. 353, 57 Am. Rep. 278.

[23] 1897, Sickles v. New Orleans, **supra.**

[1] 1908, Ege v. Hering, 108 Md. 391, 416, 70 Atl. 221.

[2] 1912, Taylor v. Columbian University, 226 U. S. 126, 33 S. Ct. 73 (affirming 35 App. Dist. Col. 68).

[3] 1910, Larkin v. Wikoff, 75 N. J. Eq. 462, 477, 72 Atl. 98, 79 Atl. 365 (affirmed 77 N. J. Eq. 589, 78 Atl. 1134; reversed 79 N. J. Eq. 209, 81 Atl. 365).

[4] 1895, Webster v. Wiggin, 19 R. I. 73, 93, 31 Atl. 824, 28 L. R. A. 510.

for some years, and then surrenders the property, such property passes to the trustee of the second charity, and does not pass under a codicil which gives the property to still another charity in case all the first named trustees fail to accept it and establish the charity.[5] A primary gift capable of execution must, therefore, prevail, though the fund could be more efficiently and judiciously administered by the alternative.[6] Of course, where the attempted charity is void, and the testator provides that in that case the gift shall absolutely vest in certain persons, the **cy pres** doctrine can have no application.[7]

§ 151. **Illegality of one of Testator's Purposes.** Where a gift is made for a number of purposes, one or more of them may be or become illegal. It will not be assumed that the donor intended that his gift should fail in such event. The presumption is rather that he intended that his scheme should be carried out as far as the law allows.[8] "If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose, whose general nature is described, so that a general charitable intent can be inferred, then, if by a change of circumstances, or in the law, it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of **cy pres** will be applied in order that the general charitable intent, which the court regards as the dominant one, may not be altogether defeated."[9] This principle is vividly illustrated by the Mormon case which came before the Utah and United States supreme courts in 1889 and 1892. Through the industry and frugality of the Mormon people a fund of $400,000 had been created which was consecrated to the religious purposes of the Mormon faith. One of the tenets of this religion, polygamy, having been declared unlawful, an attempt was made to wrest this property from the church and devote it to the Utah public school system. The state court refused to make such a disposition on the ground that,

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[5] 1923, Young v. Davis, —— Ky. ——, 252 S. W. 100.

[6] 1898, Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516 (Affirming 70 Ill. App. 575).

[7] 1922, Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796.

[8] 1865, Odell v. Odell, 92 Mass. (10 Allen) 1, 14.

[9] 1897, Teele v. Bishop of Derry, 168 Mass. 341, 343, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401.

"when property is given to a class of objects in general terms, and also directed to be applied to one of them in special terms, if the application to that one becomes unlawful or impracticable, the doctrine of **cy pres** authorizes the court to devote it to one or more of those embraced in the general intent most analogous to the one specially named,"[10] and this decision was upheld by the United States Supreme Court.[11] Accordingly, the property involved has been devoted to such purposes connected with the Mormon religion as are not illegal.

§ 152. **Illegality of a Part of Testator's Scheme.** It makes no difference that a part of the scheme devised by the testator is illegal at the very time when the gift becomes effective. A charity will not be declared void because it cannot take effect as fully as the donor intended, but will be given effect as far as possible.[12] "Where a trust is for several purposes, some valid and some invalid, it will be supported so far as it is good, provided such part is separable from the rest and no violence will thereby be done to the testator's general intent."[13] Where, therefore, the primary intent of the testator is to found a new library, or to assist an existing one, a direction that his works be published by the beneficiary every ten years, which is illegal because of the contents of these works, will be disregarded, and the donor's primary intent carried out.[14] An invalid bequest, subsidiary to and trifling as compared with the main gift, will not be allowed to defeat it.[15]

§ 153. **Subsidiary Condition illegal.** The same principle applies where merely some subsidiary condition connected with the charity is found to be illegal. While a bequest to a town "strictly on this condition," that the beneficiary support a Unitarian clergyman, fails because of the inability of

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[10] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 339, 340, 31 Pac. 436 (reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44).

[11] 1889, Mormon Church v. United States, 136 U. S. 1, 58, 59, 34 L. Ed. 478, 10 S. Ct. 792 (affirming 5 Utah 361, 15 Pac. 473).

[12] 1914, Wilson v. First National Bank, 164 Iowa 402, 415, 145 N. W. 948, Ann. Cas. 1916, D. 481.

[13] 1885, Bristol v. Bristol, 53 Conn. 242, 257, 5 Atl. 687.

[14] 1880, Manners v. Philadelphia Library, 93 Pa. 165, 174, 39 Am. Rep. 741.

[15] 1913, Burke v. Burke, 259 Ill. 262, 271, 102 N. E. 293.

the town to fulfill the condition,[16] the situation is different where the condition is subsequent rather than precedent.[17] The legality and practicability of such subsidiary directions will exert no influence over the question of the validity of the gift.[18] The court "is bound to carry the will into effect, if it can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal."[19] A legal agency will, therefore, be provided where that devised by the donor cannot be validly organized.[20] A gift which exceeds the power of the corporate trustee to take will be either vested in it **pro tanto,**[1] or applied to its intended purpose through some other instrumentality.[2]

§ 154. **Legal and Illegal Means.** The situation is still simpler where the donor's scheme may be carried out in a legal or illegal manner. "When a fund is devoted to charity, and by the terms of the scheme pointed out by the original donor it may be applied in a legal or an illegal manner, a court of equity will make such modification of the original scheme as is necessary to avoid a violation of the law, or to confine the application of the property to the lawful uses designated by the donor."[3] In every case the principal intent of the donor will be carried out, but courts will not exercise the same unlimited discretion as if the property had escheated.[4]

§ 155. **Impossibility of executing a Part of Donor's Plan.** Not infrequently, a part of the donor's scheme becomes impossible of execution. In such cases the whole benefit is

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[16] 1891, Bullard v. Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110.

[17] 1913, Dykeman v. Jenkines, 179 Ind. 549, 561, 101 N. E. 1013, Ann. Cas. 1915, D. 1011.

[18] 1853, McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 404, 14 L. Ed. 732.

[19] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556.

[20] 1893, Crerar v. Williams, 145 Ill. 625, 652, 34 N. E. 467, 21 L. R. A. 454 (affirming 44 Ill. App. 497).

[1] 1908, In re Peabody, 154 Cal. 173, 179, 97 Pac. 184. Contra 1900, Kelly v. Welborn, 110 Ga. 540, 543, 35 S. E. 636.

[2] 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 526, 67 C. C. A. 393 (affirming 126 Fed. 796); 1907, Hubbard v. Worcester Art Museum, 194 Mass. 280, 290, 60 N. E. 490.

[3] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 317, 31 Pac. 436 (reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44.)

[4] 1889, Mormon Church v. United States, 136 U. S. 1, 64, 34 L. Ed. 1033, 14 S. Ct. 44).

shifted over to that part of the charity which is still practicable. The donee of a part of a fund has, therefore, been given control of the balance where the trustees of the charity had failed to appoint a beneficiary.[5] A gift to two churches of the same denomination as tenants in common has been given to one of them after the other had gone out of existence.[6] Land granted for church and cemetery uses has been preserved for the latter after the church had ceased to exist.[7] A gift for the endowment of two rooms in a home, any excess to be used for the sole benefit of the occupants of such rooms, has not been allowed to fail as to such excess, though by the rules of the home no extra sums could be spent on such occupants.[8] Zinc stock, donated to keep up a chime of bells in a tower in which there is a library endowed by the same donor, will, where such stock in consequence of the war has enormously risen in value, be applied suitably to rebuild the tower so as to make it more convenient for library purposes.[9] Provisions for a sinking fund and for the maintenance of a hotel bearing testator's name have been treated merely as the mode and not as the essence of the gift.[10]

§ 156. **Actual Necessity must be shown.** The amount of practical difficulty necessary to bring the doctrine into operation will depend upon the circumstances. Good reasons will have to be shown in every case before the courts will act.[11] They will not devise "a new scheme for a charity so long as that devised by the donor may take effect."[12] They will not even vary the charity on the grounds of expediency only.[13] They will not give land dedicated to a graveyard over to park purposes.[14] They will not order the sale of real

[5] 1907, Welch v. Caldwell, 226 Ill. 488, 495, 80 N. E. 1014. See 1858, Beekman v. People, 27 Barb. 260, 282 (affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[6] 1904, Osgood v. Rogers, 186 Mass. 238, 241, 71 N. E. 306.

[7] 1885, Appeal of Gumbert, 110 Pa. 496, 501, 1 Atl. 437.

[8] 1914, In re Arrowsmith, 147 N. Y. Supp. 1016, 162 App. Div. 623 (affirmed 213 N. Y. 704, 108 N. E. 1089).

[9] 1918, Camp v. Presbyterian Society of Sackets Harbor, 173 N. Y. Supp. 581, 105 Misc. 139.

[10] 1920, Hodge v. Wellman, 191 Iowa 877, 179 N. W. 534, 538.

[11] 1911, State ex rel. Heddens v. Rusk, 236 Mo. 201, 216, 139 S. W. 199.

[12] 1843, Second Congregational Society v. First Congregational Society, 14 N. H. 315, 330.

[13] 1855, Harvard College v. Society for Promoting Theological Education, 69 Mass. (3 Gray) 280, 298.

[14] 1890, Campbell v. Kansas City, 102 Mo. 326, 346, 13 S. W. 897, 10 L. R. A. 593.

estate and its investment in bonds where no showing is made that such change would be beneficial. Says the Missouri court: "Until such time as it can be shown with reasonable certainty that there will be a permanent failure of at least a substantial portion of the objects of this trust, the question as to the further administration or disposition of the fund does not arise."[15] The management of a charity will not be made the subject of change with every fluctuation of popular opinion on the question of convenience or usefulness. A charity to be managed by a university will not be turned over to individual trustees,[16] nor will a charity to be managed by trustee be turned over to the university.[17] The courts will not reform or modify the testator's scheme if it is plainly set forth and capable of execution.[18] Something more than inexpediency or inconvenience, in other words, actual necessity,[19] must be shown. Only in case of a present or impending impossibility or necessity, will the courts proceeding with due caution, and considering the interests or requirements of the charity, modify and mold the expressed provisions so as to preserve or render possible of accomplishment the dominant purpose disclosed.[20] Where, therefore, a statue contemplated by charitable gifts has been erected, the court has no authority to order a change merely because the subscribers like another statue better.[21] The impracticability of the testator's scheme must be demonstrated,[1] must be more than a mere nervous apprehension, and must be permanent in its nature,[2] but need not amount to an utter impossibility.[3] "It would be impracticable to grant relief only where there is a showing of an absolute or physical impossibility, in the literal sense of the term. An impracticability which evidences a substantial impossibility

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[15] 1920, St. Louis v. McAllister, 281 Mo. 26, 218 S. W. 312, 317.

[16] 1855, Harvard College v. Society for Promoting Theological Education, 69 Mass. (3 Gray) 280, 301.

[17] 1880, Winthrop v. Attorney General, 128 Mass. 258.

[18] 1865, Smith Charities v. Northampton, 92 Mass. (10 Allen) 498, 501.

[19] 1916, Crawford v. Nies, 224 Mass. 474, 113 N. E. 408, 413.

[20] 1899, Lackland v. Walker, 151 Mo. 210, 268, 52 S. W. 414.

[21] 1919, Eliot v. Trinity Church, 232 Mass. 517, 122 N. E. 648.

[1] 1910, Princeton University v. Wilson, 78 N. J. Eq. 1, 5, 78 Atl. 393.

[2] 1899, Lackland v. Walker, 151 Mo. 210, 266, 52 S. W. 414.

[3] 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 127, 48 S. W. 960.

will suffice."[4] A **cy pres** disposition has, therefore, been made where an orphan asylum was contemplated and a weak institution might possibly be founded with the funds available, though its existence and usefulness would be problematical.[5]

§ 157. **Unexpected Diminution. Minority View.** The question, whether an unexpected diminution of an estate, or a miscalculation of the donor, which makes his purpose unachievable for the time being, will bring the doctrine into operation, has greatly perplexed the courts. No one is able to say what social changes the mutations of time may bring about, or what political or other cataclysm the future may witness.[6] Testators not infrequently overlook the practical difficulties which surround the execution of complex schemes, greatly exaggerate the value of their property, unfold plans much beyond its resources, and forget that false calculations, mismanagement, or unfaithfulness may occur to postpone or prevent their attainment.[7] The solution of the question, of course, depends upon the ever-varying circumstances, though some courts are distinctly disinclined to apply the doctrine to such a situation. The Illinois court has pointed out that very few donations are by themselves sufficient fully to accomplish the design and object for which they are made, and that if all donations were tested by a rule of sufficiency in themselves, there would be but few that might not be diverted from the original purpose,[8] and has refused on the one hand to apply the **cy pres** doctrine and on the other to give the property to the heirs.[9] It has been said that a charitable trust, which is capable at some future time with the help of similar donations to be executed, cannot, by an agreement of all concerned sanctioned by the court, be applied to another and different, though kindred, object.[10] Similarly, the Maine court has refused to apply the doctrine where the

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[4] 1899, Lackland v. Walker, **supra.**

[5] 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 127, 48 S. W. 960.

[6] 1910, Maxcy v. Oshkosh, 144 Wis. 238, 257, 128 N. W. 899, 1138.

[7] 1853, McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 14 L. Ed. 732.

[8] 1854, Gilman v. Hamilton, 16 Ill. (6 Peck.) 225, 229.

[9] 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 339, 84 N. E. 256, 122 Am. St. Rep. 169; 1914, Eaton v. Woman's Home Missionary Society, 264 Ill. 88, 96, 105 N. E. 746.

[10] 1854, Gilman v. Hamilton, 16 Ill. (6 Peck.) 225.

fund in question was not so small as to render the plan impossible, though it was not as large as it should be to establish and maintain the institution contemplated on an extensive scale.[11]

§ 158. **Unexpected Diminution. Majority Rule.** However, the great weight of authority leans decisively in the other direction.[12] Gifts intended for the establishment of an old people's home,[13] or an industrial home for colored children,[14] proving insufficient, have, therefore, been executed **cy pres.** A gift of $500 to a hospital "to endow a bed in said institution" has been applied to the maintenance of a free bed where the sum necessary for the endowment was $5,000.[15] A bequest for a church building to be built of stone of certain dimensions and designs has been modified so as to bring it within the purchasing power of the funds donated.[16] Though a hospital costing $100,000 will not be as imposing a monument to the donor's memory as one costing $300,000, the courts will not for that reason declare a failure of the trust, but will enforce it, though necessarily in a more moderate degree than the testator had contemplated.[17] Wills frequently expressly direct that the proposed institution perpetuate the donor's name by inscribing it in bronze tablets, or by adopting it as part of the institutional name. Such provisions will not be a barrier to a **cy pres** application of the trust where the funds are insufficient to accomplish in full measure the donor's design. Says the Iowa court: "Courts have not evinced a tendency to overemphasize provisions found in wills requiring the use of a particular name in carrying out bequests in arriving at the intention of the testator."[18] On the same reasoning, a donation to be applied to a new church university to be built in Philadelphia has been applied to an existing university in the

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[11] 1910, Allen v. Nasson Institute, 107 Me. 120, 125, 77 Atl. 638.

[12] 1899, **In re** Royer's Estate, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, 369; 1900, Ford v. Thomas, 111 Ga. 493, 36 S. E. 841; 1916, **In re** MacDowell's Will, 217 N. Y. 454, 466, 122 N. E. 177.

[13] 1913, Norris v. Loomis, 215 Mass. 344, 102 N. E. 419.

[14] 1910, Grimke v. Attorney General, 206 Mass. 49, 91 N. E. 899.

[15] 1898, **In re** United States Trust Co., 56 N. Y. Supp. 376, 25 Misc. Rep. 643.

[16] 1901, Paine v. Forney, 128 N. C. 237, 38 S. E. 885.

[17] 1920, Jones Heirs v. Dorchester, —— Tex. Civ. App. ——, 224 S. W. 596.

[18] 1920, Hodge v. Wellman, 191 Iowa 877, 179 N. W. 534, 537.

suburbs of the city.[19] The failure of voluntary contributions has not been allowed to defeat the donor's purpose,[20] though it has been stated that courts have generally ignored or denied the existence of the **cy pres** doctrine in connection with dedications for school purposes.[21] Where a will, by which testator's wife and other heirs are disinherited, and the whole estate of $300,000 is left to a lodge for a sanitarium and orphan asylum, is attacked and a compromise is made by which the wife takes 40 per cent, the heirs 20 per cent, and the balance is too small to establish either institution, the sale of the real estate (which the testator had designated as the situs of the charity), and the investment of the proceeds in another existing orphan asylum conducted by the same lodge will be approved.[22]

§ 159. **Education.** Schools were established by our forefathers soon after they landed at Plymouth Rock and kept step with the hardy pioneers as they pushed westward. These schools were generally private rather than public institutions. It was not until near the middle of the nineteenth century that the public school system began its phenomenal growth. This growth was generally warmly welcomed by the existing private schools. In many instances they voluntarily gave up to the new arrival, not only their teachers and pupils, but also their property and their very existence. The change was generally felt to be advantageous to all concerned and ordinarily went unchallenged. There were instances, however, where heirs were on the alert to obtain for themselves, rather than allow the public schools to appropriate the property donated by their ancestors. In such cases the **cy pres** doctrine has been used to save the gift and adapt it to the changed conditions.[1] The courts have been delighted to carry out the general intention of the donors by appointing the public school authorities as trustees of

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[19] 1910, Kramph's Estate, 228 Pa. 455, 463, 77 Atl. 814.

[20] 1904, **In re** Daly, 208 Pa. 58, 66, 57 Atl. 180; 1901, Troutman v. De Boissiere Odd Fellows' Orphans' Home, 64 Pac. 33, 39, 5 L. R. A. (N. S.) 692 (Kans.). But see 1872, Commonwealth v. Levy, 64 Va. (23 Grat.) 21, 38.

[21] 1890, Campbell v. Kansas City, 102 Mo. 326, 346, 13 S. W. 897, 10 L. R. A. 593.

[22] 1922, McCarroll v. Grand Lodge, 154 Ark. 376, 243 S. W. 870.

[1] 1896, **In re** John, 30 Or. 494, 509, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; 1895, Attorney General v. Briggs, 164 Mass. 561, 42 N. E. 118; 1896, Green v. Blackwell, 35 Atl. 375, 376 (N. J.).

such property,[2] by authorizing long-time leases of it to them,[3] by merging such schools with the public school system,[4] by applying a gift to establish a female academy in a certain place to the support of the local public school established for the education of both sexes,[5] or even by establishing a library with the funds provided by the charity.[6]

§ 160. **Scholarship. Tuition.** In the instances just mentioned, the gifts were intended for the benefit of the schools. Where they were primarily intended for the benefit of the pupils, a different question was presented. A trust to be expended in paying the tuition of poor boys attending a certain school has, therefore, after the school had become a part of the public school system, been devoted to scholarships which go beyond the mere payment of tuition.[7] It has been held that a donation for the poor children of a certain school may be effectuated by night schools, and by furnishing them with books, clothing, and food, thus making education accessible to them despite their poverty.[8] A gift clearly intended for the elementary education of children under a certain age has, however, not been applied to the establishment of scholarships for students of a more advanced grade.[9]

§ 161. **Sale of Real Property.** The sale of property donated to charitable purposes affords one of the best illustrations of the doctrine. The power to authorize such a sale has been frequently called into action in this country, owing to the rapid changes which have characterized the marvelous growth of our cities.[10] There certainly is a very palpable distinction "between a gift of land from motives of charity, and a dedication of land to charitable uses; and there are

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[2] 1915, Lakatong Lodge v. Franklin Township, 84 N. J. Eq. 112, 116, 92 Atl. 870.

[3] 1894, Madison Academy v. Board of Education of Richmond, 16 Ky. Law. Rep. 51, 26 S. W. 187.

[4] 1912, Mars v. Gibert, 93 S. C. 455, 467, 77 S. E. 131.

[5] 1889, Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785. See 1906, Inglish v. Johnson, 42 Tex. Civ. App. 118, 123, 95 S. W. 558. **Contra** 1910, Allen v. Nasson Institute, 107 Me. 120, 123, 77 Atl. 638.

[6] 1880, **In re** Lower Dublin Academy, 8 Wkly. Notes Cases 564 (Pa.).

[7] 1910, Pembroke Academy v. Epsom School District, 75 N. H. 408, 75 Atl. 100, 37 L. R. A. (N. S.) 646. See 1872, Birchard v. Scott, 39 Conn. 63.

[8] 1867, McIntire v. Zanesville, 17 Ohio St. 352, 364.

[9] 1906, Crow v. Clay County, 196 Mo. 234, 277, 95 S. W. 369; 1912, Mars v. Gibert, 93 S. C. 455, 465, 77 S. E. 131. But see 1882, Hathaway v. New Baltimore, 48 Mich. 251, 12 N. W. 186.

[10] 1899, Lackland v. Walker, 151 Mo. 210, 253, 52 S. W. 414.

most intrusive reasons giving a judicial bias in favor of satisfying the motive without establishing a perpetual dedication."[11] While a sale of such property will not be decreed merely because some of the beneficiaries,[12] or the trustees themselves,[13] have no further use for it and desire to sell it, or because some advantage will accrue through such a sale,[14] or because the devisee can take a bequest but not a devise,[15] or so long as the property is needed for the purpose of the trust,[16] such action where the exigencies of the trust require it, though it results in a conversion of real into personal property,[17] or of personal into real property,[18] or in a change of one form of personal[19] or real[20] property into another form of the same class of property, is not a diversion, but frequently the best method of executing the trust. It will, accordingly, be directed by the courts in all proper cases.[21] The same result is accomplished when the property of a charity is taken by eminent domain.[1] The incidental purpose of the donor that the particular real estate given by him be used as the seat of the charity will be disregarded in order to carry out his primary purpose.[2] The proceeds realized must, of course, be reinvested in similar property for the same uses and trusts,[3] or at least must be used for the same purposes.

§ 162. **Express Power to sell.** A power to sell is sometimes contained in the very instrument by which a gift is made. It cannot admit of a doubt that such a power may

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[11] 1851, Griffiths v. Cope, 17 Pa. (5 Harris) 96, 99.

[12] 1912, Mott v. Morris, 249 Mo. 137, 155 S. W. 434.

[13] 1912, Mott v. Morris, 249 Mo. 137, 146, 155 S. W. 434.

[14] 1899, Lackland v. Walker, 151 Mo. 210, 268, 52 S. W. 414. But see 1889, Peter v. Carter, 70 Md. 139, 143, 16 Atl. 450.

[15] 1874, Starkweather v. American Bible Society, 72 Ill. 50, 59, 22 Am. Rep. 133.

[16] 1884, Coit v. Comstock, 51 Conn. 352, 50 Am. Rep. 29.

[17] 1854, Barr v. Weld, 24 Pa. (12 Harris) 84, 87.

[18] 1905, Stearns v. Newport Hospital, 27 R. I. 309, 319, 62 Atl. 132.

[19] 1876, Bethlehem v. Perseverance Fire Co., 81 Pa. (31 P. F. Smith) 445, 458.

[20] 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 467, 8 S. W. 346.

[21] 1884, Ryan v. Porter, 61 Tex. 106; 1866, Stanley v. Colt, 72 U. S. (5 Wall.) 119, 169, 18 L. Ed. 502. See 1918, Babcock v. African M. E. Zion Society, 92 Conn. 466, 103 Atl. 665; 1921, Community of Priests of St. Basil v. Byrne, 236 S. W. 1016 (Tex. Civ. App.).

[1] 1921, Hicks v. Providence, 43 R. I. 484, 113 Atl. 791.

[2] 1869, Brown v. Meeting Street Baptist Society, 9 R. I. 177, 187; 1872, Goode v. McPherson, 51 Mo. 126.

[3] 1911, Tate v. Woodyard, 145 Ky. 613, 615, 140 S. W. 1044.

be conferred by the donor on the trustees.[4] Nor need this be done in express terms. A direction that the land devised be placed in a fund, clearly authorizes the trustees to sell it.[5] A gift of certain shares with a direction that the dividends be reinvested in the same stock, until the fund shall amount to a certain sum, authorizes the sale of the entire stock after it has reached the designated value.[6]

§ 163. **Implied Power to sell.** Such an explicit power or direction is not absolutely necessary. The authority to sell may be implied[7] from a devise of real property in fee to a trustee for educational purposes.[8] This implied consent may result from circumstances, or lapse of time, or both.[9] Under a devise to a religious society for a meeting house, it is not implied that the donees shall not use the land except for a church, and that they shall never sell it.[10] The trustee in such a case "may sell the property in the proper and **bona fide** execution of the trust, and the court of chancery may decree the sale."[11]

§ 164. **Implied Power to sell. General Intention.** This implied consent is deduced from the donor's general intention.[12] Where he has donated a lot for a hospital and has provided money to build it, and the lot proves to be unsuitable, his main purpose (to found the hospital) will be carried out by selling the lot and by purchasing another. The use of the lot will be regarded merely as the mode in which he intended to have his general purpose accomplished.[13] The same result has been reached where a chapel,[14] a church,[15] or residence property[16] was involved.

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[4] 1901, De Veaux College v. Highlands Land Co., 71 N. Y. Supp. 857, 63 App. Div. 461.

[5] 1914, Morris v. Winderlin, 92 Kans. 935, 940, 142 Pac. 944.

[6] 1904, Bellows Free Academy v. Sowles, 76 Vt. 412, 420, 57 Atl. 996.

[7] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 622.

[8] 1906, McDonald v. Shaw, 81 Ark. 235, 244, 98 S. W. 952.

[9] 1844, Pownall v. Myers, 16 Vt. 408, 415.

[10] 1851, Griffiths v. Cope, 17 Pa. (5 Harris) 96, 100. But see 1913, Seif v. Krebs, 239 Pa. 423, 425, 86 Atl. 872.

[11] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed) 305, 355.

[12] 1869, Brown v. Meeting Street Baptist Society, 9 R. I. 177.

[13] 1890, Weeks v. Hobson, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147.

[14] 1910, Brice v. All Saints Memorial Chapel, 31 R. I. 183, 202, 76 Atl. 774.

[15] 1923, First Cong. Soc. of Bridgeport v. Bridgeport, —— Conn. ——, 121 Atl. 77.

[16] 1874, Methodist Episcopal Society v. Harriman, 54 N. H. 444, 446; 1914, Sailors' Snug Harbor v. Carmody, 211 N. Y. 286, 105 N. E. 543; 1893, In re Van Horne, 18 R. I. 389, 393, 394, 28 Atl. 341.

§ 165. **Illustrations.** Other striking illustrations are at hand. A fine homestead, devised for the benefit of deaf children, was so damaged by fire that it became impossible to repair it and retain enough funds to conduct the institution. The court, therefore, authorized its sale and the application of the proceeds to an existing home for such children which was known to the testator and had the identical policy prescribed by him.[17] Real property given to two charitable institutions, but found to be too small for their purposes, which required separate buildings, has been sold and the proceeds divided and reinvested in two separate pieces of land.[18] A college for the education of colored clergymen, being a failure on account of the race prejudice existing in the county, has been sold and the proceeds invested in another county where there was no such prejudice.[19]

§ 166. **Condition against Sale. Implied Power.** Even an express condition against a sale will not necessarily make any difference. A condition against alienation will not prevent a court from permitting, in case of necessity, arising from unforeseen changes of circumstances, the sale of the property and the application of its proceeds to the purposes of the trust.[20] "Nothing short of a plain unequivocal direction, that no part of the land shall be parted with for any purpose whatever, ought to be held sufficient to restrain the managers from doing that which the interests of the charity under their control require of them."[21] There must be a

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[17] 1909, Ely v. Attorney General, 202 Mass. 545, 89 N. E. 166. For similar cases see 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 48 S. W. 960; 1901, Amory v. Attorney General, 179 Mass. 89, 60 N. E. 391.

[18] 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 467, 8 S. W. 346.

[19] 1892, Hill v. McGarvey, 14 Ky. Law. Rep. 101, 19 S. W. 586.

[20] 1882, Jones v. Habersham, 107 U. S. 174, 183, 27 L. Ed. 401, 2 S. Ct. 336 (affirming Fed. Cas. No. 7, 465; 3 Woods 443).

[21] 1894, **In re** Mercer Home for Disabled Clergymen, 162 Pa. 232, 239, 29 Atl. 731. Thus, where the grantor of a lot to a church provided in the deed that if the grantee shall by any means, or in any way, cease to support the exercises of religion in such house, or in case of its destruction in another house to be erected on the same ground, the inhabitants of the city are to take it, and if they refuse, that the property is to revert to the grantor or his heirs, the fact that the lot has become completely unsuited to the needs of the society does not authorize its sale. 1923, First Congregational Society of Bridgeport v. Bridgeport, —— Conn. ——, 121 Atl. 77.

necessity, however, for such action, and it must be shown that an alienation and violation of the specific instructions will accord more nearly with the donor's general purposes than an adherence to them.[1] Trustees, forbidden to alien the property, may sell it by quit-claim deed to a railroad company where it has been condemned for such purposes and the company offers a higher sum for the fee than the condemnation proceedings have yielded for the public use.[2] A county, which is made the trustee of a charity, may sell bank stock bequeathed to it which by law can be held only by individuals, though the testator has provided that such stock be kept "as a perpetual fund to remain in said bank while it exists."[3]

§ 167. **Illustrations.** It is not difficult to adduce other illustrations. While no sale of property left as an endowment and directed to be leased only will be ordered so long as leases can be made, though at a small profit,[4] a different situation arises where a local prejudice against such leases has developed so that it has become impossible to pay with the rentals, the taxes and special assessments.[5] Land, given in perpetual trust for a charity, may be sold where it has been cut off from the main body by a street and has thus been rendered useless.[6] A residence devised to a church for a rectory on condition that "the same shall not be disposed of, sold, or used in any other way, or for any other purpose," has been aliened, and the proceeds reinvested for the same purpose in other land where the building had burned and the lot was near a freight depot and was totally unfit for residence purposes.[7] A direction that a small burial ground on testator's farm be retained as a cemetery forever, has not prevented its sale after all the bodies had been exhumed and no interments had taken place for forty years, and the ground had become surrounded by a blast furnace with ore

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1 1898, Rolfe and Rumford Asylum v. Lefebre, 69 N. H. 238, 242, 45 Atl. 1087.

2 1898, Rolfe and Rumford Asylum v. Lefebre, supra.

3 1894, Rush County v. Dinwiddie, 139 Ind. 128, 137, 37 N. E. 795.

4 1899, Lackland v. Walker, 151 Mo. 210, 269, 52 S. W. 414.

5 Lackland v. Walker, supra.

6 1872, Academy of the Visitation v. St. Clemens, 50 Mo. 167; 1894, In re Mercer's Home for Disabled Clergymen, 162 Pa. 232, 29 Atl. 731.

7 1913, Grace Church v. Ange, 161 N. C. 314, 77 S. E. 239.

roasters, slag dumps, and cinder-banks, while a quarry was near by.[8]

§ 168. **Sale. Charity must be benefited.** The sale must be made with a view of benefiting the charity. It is the duty of the trustee to preserve the trust property and to act favorably toward the trust interests. If he sells the property, he must be prepared to show that the transaction is beneficial to the trust, or the sale will be set aside.[9] Even a statute cannot alter this rule.[10] Where the sale would defeat or prejudice the object of the charity, there is no power to sell.[11] A sale of land, held for an orphan asylum, to one of the trustees of the charity, therefore, is absolutely void. The rule, applicable where there are definite **cestui que trustent,** certainly applies where the beneficiaries are among the most helpless of God's human creatures and profit made in the administration of the trust is bread of life wrested from destitute infancy.[12]

§ 169. **New Trustee. Appointment. Special and General Intent.** The appointment by the courts of a successor, or successors, of the original trustee, or trustees, affords another illustration of the working out of the general intention. Some testators have great confidence in the trustee appointed by them and intend to vest in him, and him only, a power to name the particular charities to be benefited. In such case, the testator has only a special intent which fails where the trustee dies or becomes incompetent without having exercised the power. Where, however, the testator has a general, as well as a special, intent, in other words, where he intends that his charity is not to be absolutely dependent on the action of the particular individual selected by him as its almoner, his general intent will be carried out by the appointment of successors.[13] Thus, if the trustees appointed by the testator (elders of a church, the governor of a state, and the mayor of a city) should fail to exercise the naked power of naming a board of trustees of the proposed school,

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[8] 1901, Funk's Estate, 16 Pa. Super. Ct. 434.

[9] 1882, Beckwith v. St. Philip's Academy, 69 Ga. 564, 570.

[10] 1892, Kelso v. Steiger, 75 Md. 376, 24 Atl. 18.

[11] 1856, Grissom v. Hill, 17 Ark. 483, 488, 489.

[12] 1875, In re Taylor Orphan Asylum, 36 Wis. 534, 553.

[13] See Chapter 10, Sections 402 to 404.

the judicial **cy pres** power would fill the breach.[14] Where, therefore, a trust deed places certain powers of direction in the "First Members" of the Christian Science Church, the abolishment of first members does not abrogate the trust, but the same will be exercised by the directors who succeed the members.[15]

§ 170. **Court Decree. Importance.** The importance of a court decree should not be overlooked. The purchaser of trust property is entitled to a marketable title.[16] Courts are called upon to sanction the alienation of real property devoted to charity, not because without such sanction the sale may not be valid, but because without such sanction it is open to doubt.[17] What is true where property is changed from real into personal or from personal into real estate, is doubly true where some other **cy pres** disposition of it is desired. "In the absence of any scheme judicially approved, the trustees of a charity may not make a **cy pres** application of the estate upon their own authority."[18] They cannot accomplish a **cy pres** result by a chain of conveyances which change both the trustee and the property.[19] A gift to a parish which has, without the interposition of a court, been transferred to a school district may, therefore, be recovered by the parish.[20] A bill asking for the application of the **cy pres** doctrine should join the attorney general,[21] allege the existence of some society, corporation, or agency through which a **cy pres** application can be made, or propose some plan which will substantially effectuate the donor's intent.[1] This, however, while desirable, is not absolutely necessary. The scheme may either be proposed by the litigants, or reported by a master, or framed by the court itself.[2]

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[14] 1921, Long v. Union Trust Co., 272 Fed. 699 (affirmed 280 Fed. 686).

[15] 1921, Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852, 857.

[16] 1913, Seif v. Krebs, 239 Pa. 423, 426, 86 Atl. 872.

[17] 1869, Brown v. Meeting Street Baptist Society, 9 R. I. 177, 188.

[18] 1915, Lakatong Lodge v. Franklin Township, 84 N. J. Eq. 112, 116, 92 Atl. 870; 1923, Weme v. First Church of Christ Scientist, —— Or. ——, 219 Pac. 618.

[19] 1887, Morville v. Fowle, 144 Mass. 109, 10 N. E. 766.

[20] 1878, Second Religious Society v. Harriman, 125 Mass. 321; 1920, Jansen v. Godair, —— Ill. ——, 127 N. E. 97, 101.

[21] 1920, Christian v. Catholic Church of St. John, 91 N. J. Eq. 374, 110 Atl. 579.

[1] 1913, People v. Braucher, 258 Ill. 604, 610, 101 N. E. 944, 47 L. R. A. 1015.

[2] 1904, Osgood v. Rogers, 186 Mass. 238, 71 N. E. 306.

§ 171. **Legislative Power.** It has been seen that no prerogative **cy pres** power is vested in the American courts. Whether such power resides in the legislatures is another question. The right of the legislature to interfere has been flatly denied in a few cases.[3] It has been said that the power to authorize a sale of property held under a charitable trust is a judicial power which cannot be exercised by the legislature.[4] There is good reason, however, for the existence of such power. Endowments make one generation a life tenant for the next. Each generation, however, should be able to adapt its endowments to its own needs so that they will yield the maximum of good or at least do the minimum of harm. In the administration of private trusts, the intention of the creator of the trust must, within the limits of legality, override all other considerations; but when the state cooperates with the founder of a charitable trust in giving effect to his intentions, by means of the special immunities and privileges, exclusively accorded to such trusts, the public interests should control their administration coördinately with the intentions of the founder.[5] It has, accordingly, been intimated in a number of cases that the legislature has such power.[6] It has been said that it is vested with the royal prerogative except as limited by the constitution.[7] The **parens patriae** power has been traced to it rather than to the courts.[8] The Supreme Court of the United States has held that property given to charity becomes in a measure public property, consecrated to the public use as one of the public resources for promoting human happiness, and that it devolves upon the state, through its courts or its legislature, to apply it to similar uses where the uses expressed are

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[3] 1858, Tharp v. Fleming, 1 Houst. 580 (Del.); 1875, Saxton v. Mitchell, 78 Pa. (28 P. F. Smith) 479.

[4] 1866, Stanley v. Colt, 72 U. S. (5 Wall.) 119, 169, 18 L. Ed. 502; 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 82 Atl. 582.

[5] Report of Commissioners, 70 L. T. 455.

[6] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 576; 1888, Newark v. Stockton, 44 N. J. Eq. (17 Stew.) 179, 14 Atl. 630; 1909, **In re** St. Michael's Church, 76 N. J. Eq. 524, 533, 74 Atl. 491; 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 108, 1 Rich. Law. 176 Note (S. C.); 1917, Adams v. Bohom, 176 Ky. 66, 195 S. W. 156, 161.

[7] 1889, Penny v. Croul, 76 Mich. 471, 480, 43 N. W. 649, 5 L. R. A. 858.

[8] 1882, Hathaway v. New Baltimore, 48 Mich. 251, 254, 12 N. W. 186.

illegal.[9] Instances of such legislative intervention are at hand.[10] Congress has authorized the application of the **cy pres** power in the territories,[11] though such action actually overruled the determination made by the territorial court.[12] It has been said that the power of the sovereignty of the state is fully adequate to bestow upon trustees of a charity authority to change the trust estate from real into personal property.[13] The question, whether such action impairs the obligation of a contract, has been answered in the affirmative by the Massachusetts,[14] and in the negative by the South Carolina[15] courts. The North Carolina court has held that, where the trust is void because the objects are too indefinite, there can be no aid by legislation; but where the objects are sufficiently definite, and the trust is valid, the legislature may interfere to remove the difficulty in regard to the beneficiaries.[16] In Pennsylvania a **cy pres** doctrine has been established through legislation which comes quite near to the English doctrine.[17] However, it has been held in Massachusetts that while the legislature may authorize the conversion into personalty of real estate held in trust, exercise a considerable power over charitable trusts held by municipalities, and enact general laws respecting the regulation of such trust gifts to trustees or to charitable corporations accepted by them on trusts, expressed or implied, constitute obligations which ought to be enforced and held sacred under the constitution, and that it is not within the power of the legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of **cy pres.**[18] It would

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[9] 1889, Mormon Church v. United States, 136 U. S. 1, 59, 34 L. Ed. 478, 10 S. Ct. 792 (affirming 5 Utah 361, 15 Pac. 473).

[10] 1815, Pawlet v. Clark, 13 U. S. (9 Cranch) 292, 3 L. Ed. 735; 1866, Stanley v. Colt, 72 U. S. (5 Wall.) 119, 169, 18 L. Ed. 502; 1908, Ware v. Fitchburg, 200 Mass. 61, 85 N. E. 951.

[11] 1889, Mormon Church v. United States, **supra.**

[12] 1893, United States v. Mormon Church, 150 U. S. 145, 14 S. Ct. 44, 37 L. Ed. 1033 (reversing 8 Utah 310, 31 Pac. 436).

[13] 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 318, 82 Atl. 582.

[14] 1890, Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.

[15] 1859, Attorney General v. Clergy Society, 10 Rich. Eq. 604, s. c. 8 Rich. Eq. 190 (S. C.).

[16] 1869, Miller v. Atkinson, 63 N. C. 537, 540.

[17] See Chapter 2, Sections 86 to 90.

[18] 1921, **In re** Opinion of Justices, 237 Mass. 613, 131 N. E. 31, 32.

seem to be clear from what has just been said that, whenever the American judicial **cy pres** doctrine shall prove to be insufficient to accomplish the proper result, the legislative power will be called into action for this purpose.

§ 172. **Miscellaneous Applications.** It remains to notice a few scattered applications of the doctrine. There is no valid reason why it should not apply where testator's scheme breaks down before, as well as where it breaks down after administration has begun.[19] The fact that an estate is insufficient to pay all the legacies,[20] or that its residue is given to another charity,[21] will not prevent its application. Inconsistencies between the various sections of a will, will be reconciled so as to fit in with the general intention.[1] The provisions made by the donor for the selection of teachers and pupils of an existing school will, though they are somewhat inconsistent with the fundamental rules of such school, be harmonized with and grafted on the fundamental provisions of such school, and the whole performed.[2] The fact that a provision for security is eliminated,[3] or that the application of the doctrine will have the effect of lessening the burden of taxation upon the rich as well as the poor,[4] will be no valid objection. Its application may even accelerate the vesting of the estate in the charity.[5] Where a probate court is empowered to act in a certain matter within one year after testator's death, the power will cease after such year has elapsed, and will not be extended by the application of the **cy pres** doctrine.[6]

§ 173. **Summary. Judicial Power.** The English prerogative **cy pres** power has its foundation, 1, in the superstition of the middle ages, 2, in the doctrine of the royal prerogative. When America was settled, this superstition was no longer a living force, while the power of the English king was elimi-

[19] 1911, Adams v. Page, 76 N. H. 96, 97, 98, 79 Atl. 437.

[20] 1848, Winslow v. Cummings, 57 Mass. (3 Cush.) 358.

[21] 1895, Attorney General v. Briggs, 164 Mass. 561, 568, 42 N. E. 118.

[1] 1905, In re Handley, 212 Pa. 11, 61 Atl. 350.

[2] 1861, Silcox v. Harper, 32 Ga. 639, 650.

[3] 1884, Peynado v. Peynado, 82 Ky. 5, 13, 5 Ky. Law. Rep. 753.

[4] 1906, Crow v. Clay County, 196 Mo. 234, 271, 95 S. W. 369.

[5] 1884, Peynado v. Peynado, 82 Ky. 5, 10, 5 Ky. Law. Rep. 753.

[6] 1914, Lackland v. Hadley, 260 Mo. 539, 169 S. W. 275; 1847, Baker v. Smith, 54 Mass. (13 Met.) 34, 41.

nated by the Revolutionary War. In consequence, the prerogative **cy pres** power has not been recognized in the United States, at least so far as the courts are concerned. This does not, however, imply that the **cy pres** power itself has been destroyed. A distinction must be made between a judicial and a prerogative application of it. This distinction has not been kept in mind in some of the earlier cases, and hence confusion has resulted in a number of states. The matter, however, is now properly settled in all but a few states. Accordingly, where a valid charitable trust has been created, and a literal compliance with the specific intention of the donor has, by change of circumstances, become impossible, the courts will determine whether there was a general intent on the donor's part, and will, where such general intent is found, carry it out, but approximate as near as may be to the special intent expressed. In determining whether there is a general intent, the existence of a reverter clause, or of an alternative provision, will be an important consideration. The fact that a part of the testator's scheme is, or becomes, impossible, or illegal, will not prevent the application of the doctrine, but will, on the contrary, call it into action. The donor's scheme accordingly will be carried out, so far as it is still legal or possible. The doctrine will not be applied for mere convenience, but will be limited to cases of necessity. Such necessity will not be lightly implied on the one hand, nor will it, on the other, be limited to cases of absolute physical impossibility. The question, whether an unexpected diminution of an estate amounts to such a necessity, has divided the courts, though the majority favors the application of the doctrine to such cases.

§ 174. **Summary. Prerogative Power.** While the courts do not possess any prerogative **cy pres** power, it does not follow that such power is non-existent in the American states. It is possible that it was inherited by the legislative branch of the government. There has not, however, been much occasion to invoke it. Nevertheless, it is the power thus residing in the legislature that will furnish the remedy when the judicial power shall prove insufficient to remedy the defects which will crop up in the future.

CHAPTER IV

WHAT IS A CHARITY?

§ 184. **Necessity and Propriety of Charitable Gifts.** Legacies for charitable purposes are authorized by the law to procure aid from individuals in supplying those wants which the state itself or the communities into which it is divided are obligated to provide for in the interest of society and as a function of government.[1] They are one of the means of maintaining a proper equilibrium between inequality of distribution, and industrial accumulation. In their several ways, they probably more efficiently promote the public good than all the aid which the state could furnish without their assistance.[2] They are necessary and will long remain necessary. "The time when sweet charity and mutual helpfulness and prosperity, thrift, and independence shall have become so universal as to leave no room for the exercise of the widest liberality of the private giver, is yet a considerable distance in the future."[3] Such gifts, rather than bequests to relatives, are also in most instances eminently proper from every just and equitable viewpoint. In many cases in this new country, the next of kin have contributed nothing to the wealth and comfort of the testator, and have no moral claim on his bounty, while it is frequently the growth of the community in which he has spent his life, and which will benefit from his charity, which has made the accumulation of his fortune possible.[4] Modern thought, therefore, tends more and more to the conclusion that the ownership of great wealth is not merely for the transmission of it to one's own family, but is largely a public trust, and hence, where the property is more than sufficient for the reasonable needs of the heirs and next

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[1] 1853, State v. McDonogh, 8 La. Ann. 171, 248. Cited 1899, Succession of Meunier, 52 La. Ann. 79, 87, 26 So. 776, 48 L. R. A. 77.

[2] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[3] 1914, Wilson v. First National Bank, 164 Iowa 402, 416, 145 N. W. 948, Ann. Cas. 1916, D. 481.

[4] 1913, In re Douglas (Roger v. Potter), 94 Neb. 280, 289, 143 N. W. 299, Ann. Cas. 1914, D. 447.

of kin, the owner should appropriate a part of it to serve the public welfare or the general benefit of his community. Says the North Carolina court: "In death as in life, those who have accumulated large estates should have regard 'for the spears of Judah and the archers of Benjamin'—that solid mass of men who have lived in poverty or struggled through life on small means, yet whose law-abiding spirit has protected the property of those who have made large accumulations of wealth, in safety and untroubled by the spoiler."[5] A large discretion is, of course, given to the donor as to the particular disposition to be made of the gift. It will make no difference that, in the opinion of responsible persons, the proposed charity has no useful function since the field is already sufficiently covered. Therefore, the fact that there is no real or apparent necessity for building another church in a city, as there would be no congregation to worship, is immaterial. A sluggish or dormant congregation is not beyond the possibility of awakening to ecclesiastical activity.[6]

§ 185. **Definition. Difficulty.** While the propriety of charitable gifts is entirely clear, the definition of the word "charity" is a matter of the greatest difficulty. Charity, in its widest sense, denotes all good affections which men bear toward each other, and in its narrowest sense, it means relief to the poor.[7] It is obvious that the possibilities of the word in its legal signification are not exhausted with mere poor relief. Almsgiving is not its primary or most important meaning. The moment the word is used in connection with charitable gifts or charitable institutions, the popular as well as legal mind takes in at once its wider scope of good will, benevolence and desire to add to the happiness or improvement of our fellow beings.[8] While there are a few cases which restrict the scope of valid charities within narrow limits, the weight of authority removes the question from

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[5] 1921, Wachovia Banking and Trust Co. v. Ogburn, 181 N. C. 324, 107 S. E. 238, 242.

[6] 1911, Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385, 387.

[7] 1856, Hamden v. Rice, 24 Conn. 350, 355; 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 377; 1882, Erskine v. Whitehead, 84 Ind. 357, 366; 1865, White v. Hale, 42 Tenn. (2 Cold.) 77, 80.

[8] 1877, Philadelphia Library Co. v. Donohugh, 12 Phila. 284, 288 (Affirmed and adopted 1878, Donohugh's Appeal, 86 Pa. 306, 312).

the field of debate.[9] Gifts for public purposes, local or general, may be charitable though they go beyond the common and narrow sense of the word.[10] It has, therefore, been said that charity "is not confined to mere almsgiving, or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man."[11]

§ 186. **Limitation of Charity.** The term "charity," however, is not without its limitations. It does not extend so far as to include all good affections which the Christian, or any other religion, or the humanitarianism of this or any other age demands. It does not merely mean the powerful spirit of Christianity. "When, in law, we speak of religious and charitable uses, we mean something more specific and technical than the pervading spirit of Christianity. We mean legal acts done for the promotion of piety among men, or for the purpose of relieving their sufferings, enlightening their ignorance, and bettering their condition."[12] Many objects of a general nature, laudable and beneficent in their character, and of general utility, are excluded from the legal definition.[13] The proper sphere of charity, therefore, lies between the two extremes just mentioned.

§ 187. **Charity a technical Word.** It is not an easy matter to fix this sphere, even after the extreme views have been eliminated. Definitions alone are insufficient. The word "charity" cannot be limited to any narrow and stated formula. "It must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity, and when new necessities are created, new charitable uses must be established. The underlying principle is the same; its

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[9] 1914, Wilson v. First National Bank, 164 Iowa 402, 409, 145 N. W. 948, Ann. Cas. 1916, D. 481.

[10] 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 644, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

[11] 1912, Little v. Newburyport, 210 Mass. 414, 417, 96 N. E. 1032; 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 949, Ann. Cas. 1918 B. 1204; 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 342, 91 N. E. 385.

[12] 1866, Miller v. Porter, 53 Pa. (3 P. F. Smith) 292, 300.

[13] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 377.

application is as varying as the wants of humanity."[14] An attempt to formulate a definition which is so specific as to cover every public charity is, therefore, sure to prove a failure.[15] Definitions are valuable, but are misleading, one and all, unless the historical development is clearly kept in mind. It must never be forgotten that the words "charity" and "charitable" are technical terms. Since the statute of Elizabeth, they have had a technical meaning both in England and America, including even those states in which the statute has been repealed or has not been reënacted or adopted.[16] "They are lifted from their popular and lexicographical meaning. In them survives a history from which they have derived a special significance. They condense volumes of controversy and decision into a phrase which must be now read by the growing light under which it has been developed."[17] Only when this history is clearly kept in mind, can the definitions which have been formulated guide the inquirer rather than mislead him. Of course, cases from jurisdictions, where the legislature has reduced charitable bequests to the level of legacies for private purposes, throw no light upon the question of what constitutes a valid charity at common law.[18]

§ 188. **Definition. Generally.** This situation has resulted in a great number of definitions formulated by judges, text-writers, lexicographers and attorneys. The subject makes such an inherent appeal to both the emotions and the judgment, and is of such vast importance to the public and to each member of it, that men from all the ranks of the legal profession have done their utmost to clarify it. The question, "What is a valid charitable gift?" has, therefore, been given "an amount of exhaustive discussion that probably no other one question in our jurisprudence has received."[19] Definitions, long and short, and more or less valuable, have been formulated. While they differ in value just as the stars of

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[14] 1890, People v. Dashaway Ass'n, 84 Cal. 114, 122, 24 Pac. 277, 12 L. R. A. 117.

[15] 1912, In re Centennial and Memorial Ass'n of Valley Forge, 235 Pa. 206, 210, 211, 83 Atl. 683.

[16] 1876, Adye v. Smith, 44 Conn. 60, 67, 26 Am. Rep. 424.

[17] 1912, In re Davis, 137 N. Y. Supp. 427, 428, 77 Misc. Rep. 72 (Affirmed 141 N. Y. Supp. 1115, 156 App. Div. 911).

[18] 1901, Haynes v. Carr, 70 N. H. 463, 483, 49 Atl. 638.

[19] 1880, Reeves v. Reeves, 73 Tenn. (5 Lea) 644, 646.

heaven differ in brilliancy, none of them can be pronounced perfect. The inherent difficulties are too great to be entirely overcome. Charity "is rather a matter of description than of definition."[20] While all the definitions agree that charity carries the implication of public utility rather than that of private personal selfishness,[21] they more or less disagree in almost everything else. It will be well, therefore, to consider the various definitions which have received currency, together with the criticism to which they have been subjected.

§ 189. **Grant's Definition. Statute of Elizabeth.** When Sir William Grant, Master of the Rolls, in 1804, was confronted with the leading English case of **Morice v. The Bishop of Durham,** he formulated a definition which was later, on appeal, approved by Lord Eldon. This definition leans on the statute of Elizabeth and declares that "those purposes are considered charitable, which that statute enumerates, or which by analogies are deemed within its spirit and intentment."[1] The enumeration of the statute is familiar and need not be reiterated here.[2] It seems to follow the enumeration of charitable objects contained in the famous early poem, "Visions of Piers Plowman."[3] It certainly was only an incident of the statute and was, therefore, placed in its preamble, and was not embraced in any of its enacting clauses. One of its purposes undoubtedly was to show which of the charitable uses, theretofore in force, were still valid, despite the doctrine of superstitious uses which had been developed during the reformation. Despite these facts this enumeration, though intended only as an inducement, has proved to be a living force long after the rest of the statute intended to be its main portion had become obsolete. It will be well,

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[20] 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 494, 16 L. Ed. 701.

[21] 1916, In re MacDowell, 217 N. Y. 454, 460, 112 N. E. 177. It has, therefore, been said that a charitable bequest does not create a trust in any strict legal sense. Such bequests are matters of public as distinguished from private concern. 1916, Eccles v. Rhode Island Trust Co., 90 Conn. 592, 98 Atl. 129, 131. "The word 'public' applied to property may either mean the character in which it is held or the uses to which it is applied." 1908, Fordham v. Thompson, 144 Ill. App. 342, 347.

[1] 9 Vesey, 399, 405, affirmed 10 Vesey 521, 541 (1804, 1805).

[2] See Chapter 1, Section 24.

[3] "Illustrations of the Origin of Cy Pres," by Joseph Willard, 8 Harv. Law. Rev. 69, 70.

therefore, to analyze this enumeration and group it in logical order.

§ 190. **Extent of Grant's Definition.** All the four recognized subdivisions of charities are represented in this enumeration, though not in proportion to their number or importance. **Municipal charities** are recognized by enumerating repair of bridges, ports, havens, causeways, sea banks and highways. **Educational charities** are covered by the words "education, and preferment of orphans, schools of learning, free schools and scholars in universities." **Eleemosynary charities** receive the greatest attention, including, as they do, relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; relief stock and maintenance for houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens and setting out soldiers' and other taxes. The **religious charities,** so abundant during the middle ages, receive the least consideration, repair of churches being the only use enumerated. This lack of particularity was probably due to the difficulty of passing a statute which was more particular on this delicate subject. Religious uses, on account of the abuses to which they had led before the reformation, were in disfavor at the time. The long-drawn-out battle between catholicism and protestantism was not yet at an end, and the puritan uprising, which forty-seven years later was to cost Charles I his head, was already casting its shadows before. This aspect of the matter was, therefore, slurred over in the most colorless manner possible.[4]

§ 191. **Enlargement by Analogy.** It is not surprising that, in the years following the statute, this enumeration should have been constantly referred to by both court and counsel. It furnished "the highest standard by which to determine charitable uses and purposes,"[5] and repealed **pro tanto** the mortmain statutes theretofore in force.[6] Contain-

[4] 43 Eliz. Chapter 4.

[5] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 326, 31 Pac. 436 (reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44).

[6] 1899, Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 402, 21 Ky. Law. Rep. 1107, 54 S. W. 200.

ing, as it did, a legislative recognition of the charities enumerated, it was but natural for counsel to attempt to bring their cases within it. In attempting to do this, difficulties were soon encountered. It was discovered that the statute furnished a rather defective legislative definition by incomplete enumeration, and, in fact, but attempted "to show by familiar examples what classes or kinds of uses are to be considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses."[7] The fact that the enumeration was but a description by sample and could not "be looked to as the sole test of what is a public charity,"[8] naturally opened the door wide to a most liberal construction of the statute. In such construction, both English and American courts have probably gone to greater lengths than in the construction of any other act of parliament.[9] The statute, wide in its terms, has received a wide interpretation in a long series of decisions, and has, in fact, been construed "with almost extravagant liberality."[10] Its enumeration has been regarded as descriptive,[11] or illustrative, rather than exhaustive and, when resorted to for light, has been liberally interpreted according to its spirit rather than its letter.[12] The twenty-one classes of trusts enumerated have been regarded merely as **criteria.** Other trusts, with objects quite remote from any known at the time of Queen Elizabeth, have been sustained as analogous, or upon general principles have been deduced from the statute by broad generalization.[13] The number of distinct charitable trusts by this process had been increased in 1833 from twenty-one to forty-six,[14] and unquestionably is greater to-day than it was then. Many uses which are **ejusdem generis** have been

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[7] 1883, Bates v. Bates, 134 Mass. 110, 114, 45 Am. Rep. 305.

[8] 1911, Buchanan v. Kennard, 234 Mo. 117, 137, 136 S. W. 415.

[9] 1854, Richmond v. State, 5 Ind. 334, 336; 1869, Thomson v. Norris, 20 N. J. Eq. (5 C. E. Green) 489, 522 (affirming 19 N. J. Eq. 307).

[10] 1853, Urmay v. Wooden, 1 Ohio St. 160, 164, 59 Am. Dec. 615.

[11] 1881, Simpson v. Welcome, 72 Me. 496, 501, 39 Am. Rep. 349.

[12] 1891, Almy v. Jones, 17 R. I. 265, 269, 21 Atl. 616, 12 L. R. A. 414.

[13] 1895, Webster v. Wiggin, 19 R. I. 73, 98, 31 Atl. 824, 28 L. R. A. 510.

[14] 1833, Magill v. Brown, Fed. Cas. No. 8,952, Brightly N. P. 346, 14 Haz. Reg. Pa. 305; 1898, Garrison v. Little, 75 Ill. App. 402, 411; 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 107, 1 Rich. Law. 176 note (S. C.). For an enumeration of these uses, see note 63, Am. St. Rep. 252-253.

and are being recognized as charities within the meaning and purview of the statute,[15] by both the judicial and legislative departments of the government. Thus, an act permitting the incorporation of the trustees of a charitable fund is an express legislative recognition of the hospital as a charity.[16] Even in states where the statute of Elizabeth is not a part of the law, its enumeration has been of assistance in deciding what is a charitable purpose.[17]

§ 192. **Enlargement by Analogy continued.** The foundation for a differentiation between the body and the soul of the statute being thus laid, it has become a well-settled rule of construction "that in determining what uses are charitable within the statute, courts are to be guided not by its letter, but by its manifest spirit and reason, and are to consider not what uses are within its words, but what are embraced in its meaning and purpose."[18] The statute has been considered as showing the general spirit and intent of the term "charitable," and the objects which come within such general spirit and intent have been declared to be charitable.[19] The word "charity" has thus assumed a distinct legal meaning derived from the statute, from the construction given to it, and from the application of it to uses not enumerated in it, but which come within its spirit by analogy.[20] Certain defined classes of gifts have thus gradually been evolved which are now universally recognized as charities.[21] All that is necessary is that the terms used by the donor bring the gift within the description of a charity within the spirit of the statute,[1] and that they do not violate any rule of public policy or the provisions of any positive law.[2] Courts have gone beyond this wide boundary, holding that a trust may be sustained as a charity merely "by showing

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[15] 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 193.

[16] 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 242, 110 N. W. 951, 10 L. R. A. (N. S.) 74.

[17] 1921, Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613, 614.

[18] 1865, Drury v. Natick, 92 Mass. (10 Allen) 169, 177, 178.

[19] 1898, Hoefler v. Clogan, 171 Ill. 462, 468, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

[20] 1885, White v. Ditson, 140 Mass. 351, 352, 4 N. E. 606, 54 Am. Rep. 473.

[21] 1889, George v. Braddock, 45 N. J. Eq. (18 Stew.) 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511 (reversing 44 N. J. Eq. 124, 14 Atl. 108).

[1] 1881, Simpson v. Welcome, 72 Me. 496, 501, 39 Am. Rep. 349.

[2] 1890, Field v. Drew Theological Seminary, 41 Fed. 371, 373.

specific authority from the legislature to perpetuate itself for the public or general benefit.''[3]

§ 193. **Enlargement by Analogy concluded.** This process of adaptation is not at an end even to-day. Changes in the social structure of society continually create new needs, and with it new charities. A wider and wider significance must, therefore, be given to the term ''charity'' as civilization advances.[4] It cannot be constricted to what it was two hundred, or one hundred, or fifty years ago. New questions continually arise and must be solved in the same spirit and in the same manner in which the questions now settled have been answered. Charities will never, henceforth, be confined to those permitted by law at the time of Elizabeth. ''A gift for the advancement of religion or other charitable purpose in a manner permitted by existing laws is not the less valid by reason of having such an object as would not have been legal at the time of the passage of the statute of charitable uses.''[5]

§ 194. **Defect of Grant's Definition.** Reverting now to Grant's definition, it is clear that it is but a short statement of an historical development, and not a definition in the true sense of the term. While it is useful, and has for this reason been occasionally referred to by the courts,[6] it certainly leaves something to be desired in point of certainty and suggests no principle.[7] It merely refers the reader to an old statute and to a vast mass of judicial decisions vying with each other in a liberal construction of it. It will be well, therefore, to look to other definitions for better information.

§ 195. **Horace Binney's Definition.** When the important

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[3] 1895, Webster v. Wiggin, 19 R. I. 73, 98, 31 Atl. 824, 28 L. R. A. 510.

[4] 1910, Chapman v. Newell, 146 Iowa 415, 420, 125 N. W. 324.

[5] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 554.

[6] 1882, Erskine v. Whitehead, 84 Ind. 357, 366; 1903, Commonwealth v. Y. M. C. A., 116 Ky. 711, 721, 76 S. W. 522, 25 Ky. Law. Rep. 940, 105 Am. St. Rep. 234; 1875, Maine Baptist Missionary Convention v. Portland, 65 Me. 92, 93; 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556; 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 644, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; 1816, Haywood v. Craven, 4 N. C. 360, 2 Carolina Law Repository 557; 1849, Ayers v. M. E. Church, 5 N. Y. Super. 351.

[7] 1906, Crow v. Clay County, 196 Mo. 234, 259, 260, 95 S. W. 369; 1915, Neptune Fire Engine and Hose Co. v. Mason County, 166 Ky. 1, 9, 178 S. W. 1138.

case of **Philadelphia Baptist Association v. Hart,**[8] decided in 1819 by the United States Supreme Court, was overruled by the same court in 1844 in the still more important case of **Vidal v. Girard,**[9] this result was due in large measure to the marvelous brief submitted by Horace Binney, the sage of the Philadelphia bar. This fact has given currency to a statement made by Binney in such brief to the effect that charity is "whatever is given for the love of God or for the love of your neighbor in the Catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." This definition, if such it can be called, accordingly has been frequently cited by the courts,[10] and has been said, in an early Pennsylvania case, to "embrace all gifts for charitable uses."[11] It is true, indeed, that cases within it are undoubtedly of a charitable character.[12] "The motive which inspires a lawful act does not make it unlawful, especially if that motive is commendable."[13] No one ever for a moment supposed that there is any difficulty in enforcing a definite and specific bequest, simply because the testator's motives for making it are charitable. All bequests are charities in so far as they are without consideration. They are bounties or gifts and are dependent upon the simple

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[8] 17 U. S. (4 Wheat) 1, 4 L. Ed. 499. See Section 7, **supra.**

[9] 43 U. S. (2 How.) 127, 11 L. Ed. 205. See Section 9, **supra.**

[10] 1910, Chapman v. Newell, 146 Iowa 415, 419, 420, 125 N. W. 324; 1901, Troutman v. De Boissiere Odd Fellow's Orphans' Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.); 1891, Ford v. Ford, 91 Ky. 572, 576, 16 S. W. 451, 13 Ky. Law. Rep. 183; 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 329, 120 S. W. 283; 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 949, Ann. Cas. 1918, B. 1204; 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556; 1906, Crow v. Clay County, 196 Mo. 234, 260, 95 S. W. 369; 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 204 App. Div. 664; 1923, In re Atkinson's Will, 197 N. Y. Supp. 831; 1921, Palmer v. Oiler, 102 Ohio St. 271, 131 N. E. 362; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 280, 25 Pac. 720, 11 L. R. A. 210; 1866, Miller v. Porter, 53 Pa. (3 P. F. Smith) 292, 298; 1886, Boyd v. Insurance Patrol of Philadelphia, 113 Pa. 269, 280, 6 Atl. 536; 1892, Kelly v. Nichols, 18 R. I. 62, 71, 25 Atl. 840, 19 L. R. A. 413; 1900, Harrington v. Pier, 105 Wis. 485, 521, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; 1877, Ould v. Washington Hospital, 95 U. S. 303, 311, 24 L. Ed. 450 (affirming 1 MacArthur 541, 29 Am. Rep. 605).

[11] 1857, Price v. Maxwell, 28 Pa. (4 Casey) 23, 35.

[12] 1912, Strother v. Barrow, 246 Mo. 241, 252, 151 S. W. 960.

[13] 1917, Bills v. Pease, 116 Me. 98, 100 Atl. 146, 148.

will of the testator.[14] Of course, motive alone will not do. An association which lends money and does much good, perhaps more than if it gave the money away, is not charitable, though its purpose is in the highest degree praiseworthy and desirable.[15]

§ 196. **Binney's Definition. Criticism.** The principal objection to this definition is that it is too exclusive. The noble spirit breathed by it is too exalted for this mundane world. Charity, in the highest and noblest sense, is undoubtedly contemplated by it, but for that very reason it is utterly impracticable as applied to worldly transactions. Coiled up within many a gift to charity there is a secret motive known only to the searcher of all hearts. Who but God alone can judge of it? But, granted that earthly tribunals are endowed with the necessary omniscience, how many charities can successfully undergo such a test? "If an act to be a charity must, indeed, be free from any taint of selfishness, very much that passes under the name is spurious, while the genuine article is so extraordinary a virtue that we ought not to wonder that St. Paul, the greatest of the inspired Apostles, ranked it above the Christian graces of Faith and Hope."[16] Therefore, the Pennsylvania court, in abandoning this definition, admits that a gift within it "is a good charitable use, and in a moral sense perhaps the best,"[17] and says: "Who can say that the millionaire who founds a hospital or endows a college, and carves his name thereon in imperishable marble, does so from the love of God and love to his fellow, free from the stain of selfishness? Yet, is the hospital or the college any the less a public charity, because the primary object of the founder or donor may have been to gratify his vanity, and hand down to posterity a name which otherwise would have perished with his millions?"[18]

§ 197. **Binney's Definition. Criticism continued.** To

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[14] 1872, Newson v. Starke, 46 Ga. 88, 94.

[15] 1871, People v. Nelson, 3 Lans. 394 (N. Y.).

[16] 1866, Miller v. Porter, 53 Pa. (3 P. F. Smith) 292, 299.

[17] 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 646, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

[18] 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 643, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; 1915, Neptune Fire Engine and Hose Co. v. Mason County, 166 Ky. 1, 8, 178 S. W. 1138. See 1896, Smith's Estate, 5 Pa. Dist. Rep. 327, 330 (affirmed 181 Pa. 109, 37 Atl. 114).

this complete refutation of Binney's statement, little can be added. It is clear that the purity and unselfishness of the donor's motive is important only in the moral aspects of his act.[19] The nature and effect of a gift, not its motive, determine its legal character. It follows that "testator's motive to commemorate himself and family does not prevent the main purpose from being charitable."[20] A gift, charitable in its nature, will be recognized as such though the donor's primary intention was to amuse, or entertain, or to perpetuate his name.[1] His motive may be vanity, ostentation, or egotism,[2] may be the hope through masses to obtain some benefit for his soul,[3] or through a church building,[4] or mural tablets,[5] to memorialize his name, or may be merely personal to the intended beneficiaries,[6] without in any manner affecting the legal situation, or decreasing the value of the gift to the public at large, or to the class intended as its beneficiaries. Courts cannot look to such motive, but must confine their attention to the nature of the gift and the objects to be obtained by it.[7]

§ 198. **Binney's Definition. Conclusion.** No less a person than the great English statesman Gladstone has inveighed against charities on the ground that, whether they are attended with much or little benefit, they generally tend to gain credit and notoriety for the donor whose name appears over the building erected to house them, and is commemorated and glorified yearly at sumptuous banquets held by the body of governors appointed to rule them.[8] This con-

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[19] 1892, Episcopal Academy v. Philadelphia, 150 Pa. 565, 572, 25 Atl. 55.

[20] 1920, Massachusetts Institute of Technology v. Attorney General, 235 Mass. 288, 126 N. E. 521, 524.

[1] 1917, Gibson v. Frye Institute, 137 Tenn. 452, 193 S. W. 1059, 1061.

[2] 1896, Smith's Estate, 5 Pa. Dist. Rep. 327, 331 (affirmed 181 Pa. 109, 37 Atl. 114).

[3] 1898, Hoeffer v. Clogan, 171 Ill. 462, 469, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

[4] 1879, Cumming v. Reid Memorial Church, 64 Ga. 105; 1894, Cushman v. Church of the Good Shepherd, 162 Pa. 280, 29 Atl. 872, s. c. 188 Pa. 438, 41 Atl. 616.

[5] 1866, Miller v. Porter, 53 Pa. (3 P. F. Smith) 292, 301.

[6] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed) 305, 352.

[7] 1909, In re Graves, 242 Ill. 23, 29, 89 N. E. 672, 134 Am. St. Rep. 302, 24 L. R. A. (N. S.) 283; 1894, Union Pacific R. Co. v. Artist, 60 Fed. 365, 370, 9 C. C. A. 14, 19 U. S. App. 612, 23 L. R. A. 581. Followed 1895, Pierce v. Union Pacific R. Co., 66 Fed. 44, 13 C. C. A. 323, 32 U. S. App. 48.

[8] 10 Sol. J. and Rep. 23.

tention may be admitted, but does not alter the legal situation. Courts deal with human nature as they find it. The desire to perpetuate one's name and connect oneself with posterity is strong and universal. It stimulates the patriot to noble deeds in the senate and in the field, and prompts even the child to crave some memorial to mark his grave. No less a person than Christ himself, after Mary, the sister of Martha, a few days before his death, had brought a very precious alabaster box of ointment of spikenard, which would have sold in the market for three hundred pence, and had poured its contents over his head and feet and had wiped them with her hair, has said: "Wheresoever this gospel shall be preached throughout the whole world, this also that she hath done shall be spoken of for a memorial of her."[9] Where such feelings manifest themselves in entailments and family settlements, they are reprobated and forbidden as against public policy. Where, on the other hand, they make the hoarded treasures of a lifetime a fountain of charity for all times, they are upheld and maintained because they result in benefit to the public.[10] Many useful charitable institutions are named because of directions imposed by the donor that they must commemorate his name or that of some lamented relative.[11] Cases of such altruism as that of a Boston mechanic, whose name is not known, but who directed his entire property, amassed through a life of thrift and amounting to about $97,000, to be converted into legal tender notes, which notes he ordered to be destroyed, thus canceling a part of the war debts of the United States,[12] will not often be found. The fact that charitable donations such as gifts for masses,[13] for a parsonage,[14] for a fountain,[15] or for an ornamental gate or arch,[16] are intended in whole or part as

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[9] Marc 14, 9; Mathew 26, 13.

[10] 1863, Paschal v. Acklin, 27 Tex. 173, 197, 198.

[11] For examples, see 1910, Magaw v. Huntley, 36 App. D. C. 26; 1913, Dykeman v. Jenkines, 179 Ind. 549, 557, 101 N. E. 1013, Ann. Cas. 1915, D. 1011; 1903, In re Ogden, 25 R. I. 373, 55 Atl. 933. See Note 21 Am. and Eng. Ann. Cas. 1159.

[12] Article by George F. Tucker in 1 Green Bag 183. This will was conscientiously carried out.

[13] 1898, Hoeffer v. Clogan, 171 Ill. 462, 469, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

[14] 1917, Howard v. Howard, 227 Mass. 395, 116 N. E. 937, 939.

[15] 1914, In re Coleman, 167 Cal. 212, 138 Pac. 992.

[16] 1917, Haggin v. International Trust Co., 69 Colo. 147, 169 Pac. 138, 140.

private memorials, does not impair their public character or legal validity,[17] since such private purpose is not inconsistent with the public purposes of the gift,[18] and may, therefore, be lawfully required and lawfully complied with.[19] Charities may both herald the name and fame of their founder and dispense great blessings among their beneficiaries.[20] That a donor wishes to perpetuate his name may be pardoned,[1] and should not be considered as a weak vanity inconsistent with modesty.[2] Of course, the donor must select a valid charity as a means of carrying his name down the ages.[3] He cannot create a merely private trust in perpetuity. He cannot create a military band to be called by his name, whose duty it is to be to march to his grave on each anniversary of his death, on public holidays, and on other proper occasions, and there to play appropriate music.[4] He cannot create a perpetual trust merely to beautify and keep in repair his monument.[5]

§ 199. **Illustrations of valid Charities commemorating the Donor's Name.** It will not be difficult to further illustrate what has been said. A fitting memorial to the great Norwegian musician, Ole Bull, created by a settlement, on the part of his widow, to perpetuate his name as an inspiration to the youth of Norway, may be the object of a valid charity.[6] A drinking fountain to be erected around the statue of the donor in the principal park of the city of his residence creates a charity, though the entire large estate is to be expended on it, and though the donor is very obnoxious to

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17 1902, Eliot's Appeal, 74 Conn. 586, 602, 51 Atl. 558; 1879, Cumming v. Reid Memorial Church, 64 Ga. 105; 1911, French v. Calkins, 252 Ill. 243, 258, 96 N. E. 877; 1911, Richardson v. Essex Institute, 208 Mass. 311, 317, 94 N. E. 262; 1899, Allen v. Stevens, 161 N. Y. 122, 139, 55 N. E. 568; 1882, Jones v. Habersham, 107 U. S. 174, 189, 27 L. Ed. 401, 2 S. Ct. Rep. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

18 1894, Phillips v. Harrow, 93 Iowa 92, 102, 61 N. W. 434; 1921, Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613, 615.

19 1910, Maxcy v. Oshkosh, 144 Wis. 238, 254, 128 N. W. 899, 1138.

20 1860, Chambers v. St. Louis, 29 Mo. 543, 582; 1899, Lackland v. Walker, 151 Mo. 210, 262, 52 S. W. 414.

1 1906, Tincher v. Arnold, 147 Fed. 665, 672, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

2 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed) 305, 350.

3 1917, Bills v. Pease, 116 Me. 98, 100 Atl. 146.

4 1883, Detwiller v. Hartman, 37 N. J. Eq. (10 Stew.) 347, 354.

5 1883, Bates v. Bates, 134 Mass. 110, 45 Am. Rep. 305, 27 Alb. Law. J. 243; 1913, Morristown Trust Co. v. Morristown, 82 N. J. Eq. 521, 522, 91 Atl. 736.

6 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 949, Ann. Cas. 1918 B. 1204.

many good people of the city.[7] The fact that the testator directs that a bronze statue of himself with his name underneath in large letters be erected upon the main column of the magnificent building donated, and that a playroom for children established by his gift is to contain a mural tablet with an inscription commemorating his name, does not detract from the charitable character of his gift.[8] A condition that the proposed corporation must adopt testator's name as a part of its corporate name, and that the proposed library be similarly designated, does not void the gift.[9] Where a fund is directed to be known by a certain name, this direction will be observed, and the fund will not be allowed to be merged with the funds raised by taxation for similar purposes.[10]

§ 200. **Camden's Definition.** Among the Englishmen who were wise enough to perceive the wrong policy pursued by the British government toward the American colonies at and before the time of the revolutionary war, was Lord Camden. Accordingly, he was very popular in the United States, and his memory is perpetuated by the names of many counties, towns, and villages. For our present purposes, he is remarkable for a definition formulated by him in 1767, while he was Lord Chancellor, and which is to the effect that a charity is "a gift to a general public use which extends to the poor as well as to the rich."[11] This definition has been approved by Lord Lyndhurst,[12] and Chancellor Kent,[13] has been very frequently cited by the American courts,[14] and has

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[7] 1913, Hosmer v. Detroit, 175 Mich. 267, 141 N. W. 657.

[8] 1896, Smith's Estate, 5 Pa. Dist. Rep. 327, 329 (Affirmed 181 Pa. 109, 37 Atl. 114).

[9] 1912, Franklin v. Hastings, 253 Ill. 46, 51, 97 N. E. 265, Ann. Cas. 1913 A. 135.

[10] 1904, Brookville v. Startzell, 207 Pa. 347, 356, 56 Atl. 938; 1891, Fosdick v. Hempstead, 125 N. Y. 581, 588, 26 N. E. 801, 11 L. R. A. 715.

[11] 1767, Jones v. Williams Ambler, 651 (England).

[12] 1841, Mitford v. Reynolds, 1 Phil. Ch. 185, 191, 192 (England).

[13] 1823, Coggeshall v. Pelton, 7 Johns. Ch. 292, 294, 11 Am. Dec. 471 (N. Y.).

[14] 1897, In re Strong, 68 Conn. 527, 530, 37 Atl. 395; 1875, Doughten v. Vandever, 5 Del. Ch. 51, 65; 1898, Garrison v. Little, 75 Ill. App. 402, 411; 1882, Erskine v. Whitehead, 84 Ind. 357, 366; 1912, Ackerman v. Fichter, 179 Ind. 392, 401, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117; 1910, Chapman v. Newell, 146 Iowa 415, 419, 125 N. W. 324; 1881, Piper v. Moulton, 72 Me. 155, 159; 1881, Simpson v. Welcome, 72 Me. 496, 501, 39 Am. Rep. 349; 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 341, 91 N. E. 385; 1900, Dexter v. Har-

been called tersely defined,[15] concise and comprehensive,[16] concise and practical,[17] easily understood and applied[18] by any person of ordinary understanding.[19] Its great outstanding merit is that it calls attention to the fact that men of wealth are not excluded from being beneficiaries of a charity. "Although the relief of the poor, or a benefit to them in some way, is in its popular sense a necessary ingredient in a charity, this is not so in view of the law."[20] The controlling purpose is none the less charitable even if those who need no pecuniary aid are either directly or indirectly benefited. Every charity created for the gratuitous treatment and relief of disease, or the physical infirmities of the indigent, or for their education or religious training, helps and aids the community as a whole without regard to the social rank or pecuniary condition of its members.[21] In addition, the wealthy in common with the indigent may, as the result of some casualty, be in peril of starvation or death from cold or other exposure unless aid be promptly rendered, and may thus be members of a class worthy of public charitable relief during the emergency when money is useless in the absence

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vard College, 176 Mass. 192, 195, 57 N. E. 371; 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 948, Ann. Cas. 1918, B. 1204; 1922, Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796, 800; 1874, Gerke v. Purcell, 25 Ohio St. 229, 243; 1902, State v. Toledo, 23 Ohio Cir. Ct. Rep. 327; 1858, Cresson's Appeal, 30 Pa. (6 Casey) 437, 450; 1884, Pell v. Mercer, 14 R. I. 412, 444; 1892, Kelly v. Nichols, 18 R. I. 62, 71, 25 Atl. 840, 19 L. R. A. 413; 1918, Scott v. All Saints Hospital, 203 S. W. 146, 148 (Tex. Civ. App.); 1904, Kronshage v. Varrell, 120 Wis. 161, 168, 97 N. W. 928; 1896, Stuart v. Easton, 74 Fed. 854, 858, 21 C. C. A. 146, 39 U. S. App. 238 (affirmed 170 U. S. 383, 42 L. Ed. 1078, 18 S. C. Rep. 650); 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 506, 16 L. Ed. 701.

[15] 1920, New England Sanitarium v. Stoneham, 205 Mass. 335, 341, 91 N. E. 385.

[16] 1903, Grant v. Saunders, 121 Iowa 80, 81, 95 N. W. 411, 100 Am. St. Rep. 310.

[17] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 280, 25 Pac. 720, 11 L. R. A. 210; 1906, Crow v. Clay County, 196 Mo. 234, 260, 95 S. W. 369. See 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 644, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

[18] 1914, Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 726, 175 S. W. 571.

[19] 1900, Harrington v. Pier, 105 Wis. 485, 521, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[20] 1863, Paschal v. Acklin, 27 Tex. 173, 199. See 1919, Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699. A gift to the poor may even be a mere private charity. 1864, Attorney General v. Trinity Church, 91 Mass. 422, 439.

[21] 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 341, 91 N. E. 385.

of opportunity to purchase the needed supplies.[22] The samaritan will not refuse to bind up the wounds of the unconscious man by the wayside because he may have means to pay a physician.[1] Charity "sees the need, or want, or affliction, or suffering, and its first concern is to bring relief. The question, whether the recipient is able to pay, is the merest incident and of minor importance."[2]

§ 201. **Gray's Definition.** Before Horace Gray was appointed by President Arthur to the United States supreme bench, a famous charity case came before the Massachusetts supreme court, of which he was at the time a member. Many important and interesting questions were involved. There were able and elaborate arguments, and much deliberation and reflection by the court. The conclusions arrived at were reduced into a most learned and illuminating opinion written by Gray. In the course of this opinion, he reviewed the current definitions above cited, and found them to be deficient. In an effort to furnish something better, he added the following words at the end of this discussion: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government."[3] This definition with unusual clearness refers to the existing four classes of charities, is comprehensive and complete, includes most of the facts and circumstances and varieties of charities under the law, and is the best as it certainly is the most scientific of all the definitions. Its requisites are: Conformity to law,[4] indefinite-

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[22] 1904, Kronshage v. Varrell, 120 Wis. 161, 168, 97 N. W. 928.

[1] 1911, Buchanan v. Kennard, 234 Mo. 117, 141, 136 S. W. 415.

[2] 1922, Hart v. Taylor, 301 Ill. 344, 348, 133 N. E. 857.

[3] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556.

[4] A ticket to a "grand gift concert" performance for the benefit of certain orphan asylums, stating that the bearer is entitled to admission to the concert and to whatever gift is awarded to his number, is a lottery, and hence illegal. The character of the scheme is in no wise changed by the charitable purposes expressed in its title, nor by calling the drawings entertainments or gift concerts. 1874, **Ex parte** Blanchard, 9 Nev. 101; 1872, Neg-

ness of beneficiaries, and charitableness of purpose. It has been quoted as generally accepted,[5] has been called classic,[6] famous,[7] succinct and exhaustive,[8] clear and comprehensive,[9] satisfactory and often quoted,[10] most comprehensively and carefully drawn,[11] complete in itself,[12] sound and well established,[13] accurate, concise and comprehensive,[14] and leaving nothing to be desired.[15] It is a generalization of the instances contained in the statute of Elizabeth,[16] is the most familiar judicial definition,[17] and has been adopted "by a multitude of authorities."[18] In view of the comprehensiveness of this

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ley v. Devlin, 12 Alb. Prac. (N. S.) 210 (N. Y.); see also note in 16 Am. St. Rep. 44.

[5] 1903, Haggerty v. St. Louis K. & N. Ry. Co., 100 Mo. App. 424, 446, 74 S. W. 456. See 1905, Minot v. Attorney General, 189 Mass. 176, 179, 75 N. E. 149; 1917, Bills v. Pease, 116 Me. 98, 100 Atl. 146.

[6] 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 948, Ann. Cas. 1918 B. 1204.

[7] 1920, Peirce v. Attwill, 234 Mass. 389, 125 N. E. 609.

[8] 1881, In re Hinkley, 58 Cal. 457, 497.

[9] 1885, Johnson v. Holifield, 79 Ala. 423, 425, 58 Am. Rep. 596; 1915, Neptune Fire Engine and Hose Co. v. Mason County, 166 Ky. 1, 9, 10, 178 S. W. 1138; 1917, Vogt v. Louisville, 173 Ky. 119, 190 S. W. 695.

[10] 1920, Jansen v. Godair, 292 Ill. 364, 127 N. E. 97, 100.

[11] 1914, Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 725, 726, 175 S. W. 571.

[12] 1901, Troutman v. De Boissiere Odd Fellow's Orphans' Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.).

[13] 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 375, 77 Atl. 565.

[14] 1892, Kelly v. Nichols, 18 R. I. 62, 65, 71, 25 Atl. 840, 19 L. R. A. 413.

[15] 1904, In re Merchant, 143 Cal. 537, 544, 77 Pac. 475; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 280, 25 Pac. 720, 11 L. R. A. 210.

[16] 1896, Livesey v. Jones, 55 N. J. Eq. 204, 206, 35 Atl. 1064 (Affirmed Chadwick v. Livesey, 56 N. J. Eq. 453, 41 Atl. 1115).

[17] 1900, Harrington v. Pier, 105 Wis. 485, 520, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[18] 1916, Buckley v. Monck, 187 S. W. 31, 33 (Mo.). See for cases in which this definition has been quoted in whole or part or referred to with or without giving credit to Gray: 1912, Crim v. Williamson, 180 Ala. 179, 182, 60 So. 293; 1906, McDonald v. Shaw, 81 Ark. 235, 243, 98 S. W. 952; 1907, In re Lennon, 152 Cal. 327, 329, 92 Pac. 870, 125 Am. St. Rep. 58; 1909, In re Sutro, 155 Cal. 727, 736, 102 Pac. 920; 1914, In re Coleman, 167 Cal. 212, 138 Pac. 992; 1902, Clayton v. Hallett, 30 Colo. 231, 261, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; 1897, In re Strong, 68 Conn. 527, 530, 37 Atl. 395; 1875, Doughten v. Vandever, 5 Del. Ch. 51, 65; 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 375, 77 Atl. 565; 1872, Newson v. Starke, 46 Ga. 88, 93; 1898, Hoeffer v. Clogan, 171 Ill. 462, 468, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; 1893, Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454 (Affirming 44 Ill. App. 497); 1909, In re Graves, 242 Ill. 23, 27, 89 N. E. 672, 134 Am. St. Rep. 302, 24 L. R. A. (N. S.) 283; 1909, Mason v. Bloomington Library Ass'n, 143 Ill. App. 39, 46 (Reversed 237 Ill. 442, 86 N. E. 1044); 1907, Welch v. Caldwell, 226 Ill. 488, 498, 80 N. E. 1014; 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 334, 84 N. E. 256, 122 Am. St. Rep. 169; 1919, Skinner v. Northern Trust Co., 288 Ill. 229, 123 N. E. 289; 1919, Congregational

most perfect definition, no attempt will be made to discuss it in detail. It is so clear that it defies further comment.

§ 202. **Definition of Swayne, Pomeroy and Perry.** It remains to notice various minor definitions. Chief among these is the definition formulated by Justice Swayne of the United States Supreme Court in 1877, which accordingly has been cited with approval by a number of courts,[19] and reads as

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Sunday School and Publishing Society v. Board of Review, 290 Ill. 108, 125 N. E. 7, 9; 1919, Northwestern University v. Wesley Memorial Hospital, 290 Ill. 205, 125 N. E. 13, 17; 1882, Erskine v. Whitehead, 84 Ind. 357, 366; 1914, Wilson v. First National Bank, 164 Iowa 402, 412, 413, 145 N. W. 948, Ann. Cas. 1916 D. 481; 1915, Commonwealth v. Parr, 167 Ky. 46, 48, 179 S. W. 1048; 1871, Everett v. Carr, 59 Me. 325, 335; 1881, Simpson v. Welcome, 72 Me. 496, 501, 39 Am. Rep. 349; 1912, Book Depository v. Church Room Fund, 117 Md. 86, 91, 83 Atl. 50; 1917, Parkhurst v. Treasurer and Receiver General, 228 Mass. 196, 199, 177 N. E. 39; 1881, State v. Powers, 10 Mo. App. 263, 266 (Affirmed 74 Mo. 476); 1919, Robinson v. Crutcher, 227 Mo. 1, 209 S. W. 104; 1908, Carter v. Whitcomb, 74 N. H. 482, 486, 69 Atl. 779, 17 L. R. A. (N. S.) 733; 1898, Webster v. Sugrow, 69 N. H. 380, 381, 45 Atl. 139, 48 L. R. A. 100; 1908, Carter v. Whitcomb, 74 N. H. 482, 486, 487, 69 Atl. 779, 17 L. R. A. (N. S.) 733; 1912, Glover v. Baker, 76 N. H. 393, 419, 83 Atl. 916; 1914, Case v. Hasse, 83 N. J. Eq. 170, 175, 93 Atl. 728; 1913, Morristown Trust Co. v. Morristown, 82 N. J. Eq. 521, 522, 91 Atl. 736; 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 665, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; 1922, McCran v. Kay, 93 N. J. Eq. 352, 115 Atl. 649; 1883, Detwiller v. Hartman, 37 N. J. Eq. (10 Stew.) 347, 353, 354; 1881, Brown v. Pancoast, 34 N. J. Es. (7 Stew. 321, 324; 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. J. Eq. (2 Stew.) 36, 44); 1878, Goodell v. Union Ass'n of Children's Home, 29 N. J. Eq. (2 Stew.) 32, 35; 1919, New Jersey Title Guaranty and Trust Co. v. Smith, 90 N. J. Eq. 386, 108 Atl. 16; 1910, In re Moore, 122 N. Y. Supp. 828, 831, 66 Misc. 116 (Affirmed 128 N. Y. Supp. 1135, 143 App. Div. 973); 1911, In re Moore, 122 N. Y. Supp. 828, 831, 66 Misc. 116 (Affirmed 128 N. Y. Supp. 1135, 143 App. Div. 973; 1910, Barden v. Atlantic Coast Line R. Co., 152 N. C. 318, 327, 328, 67 S. E. 971; 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 645, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; 1912, In re Centennial and Memorial Ass'n of Valley Forge, 235 Pa. 206, 211, 83 Atl. 683; 1919, In re Lawson, 264 Pa. 77, 107 Atl. 376; 1918, Rhode Island Hospital Trust Co. v. Benedict, 41 R. I. 143, 103 Atl. 146, 148; 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 762; 1901, In re Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; 1916, Reynolds Memorial Hospital v. Marshall County, 78 W. Va. 685, 689, 90 S. E. 238; 1910, In re Kavanaugh, 143 Wis. 90, 97, 126 N. W. 672; 1896, Stuart v. Easton, 74 Fed. 854, 859, 21 C. C. A. 146, 39 U. S. App. 338 (Affirmed 170 U. S. 383, 42 L. Ed. 1078, 18 S. C. Rep. 650); 1894, Union Pacific Ry. Co. v. Artist, 60 Fed. 365, 369, 9 C. C. A. 14, 19 U. S. App. 612, 23 L. R. A. 581.

[19] 1898, Garrison v. Little, 75 Ill. App. 402, 411; 1910, Chapman v. Newell, 146 Iowa 415, 419, 125 N. W. 324; 1901, Troutman v. De Boissiere Odd Fellow's Orphans' Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.); 1891, Tilden v. Green, 130 N. Y. 29, 46, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 280, 25 Pac. 720, 11 L. R. A. 210; 1921, In re Barnwell, 269 Pa. 443, 112 Atl. 535; 1901, In re Stewart, 26 Wash. 32, 36, 66 Pac. 148, 67 Pac. 723.

follows: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man."[20] A definition formulated by Pomeroy, in his work on Equity Jurisprudence, as follows, "Charitable trusts, are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals, in which the **cestui que trustent** may be a portion or class of a public community," has been approved by the Maine court.[1] Similarly, a definition of Perry, the eminent writer on Trusts, as follows, "Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick and the afflicted; and all the gifts for the public convenience, benefit, utility or ornament, in whatever manner the donor desires to have them applied," has been approved by various courts.[2]

§ 203. **Louisiana, Rhode Island, Missouri and California Definitions.** There are a few states which have formulated definitions of their own, or have adopted a definition formulated by a text writer. It is but natural for Louisiana to adopt a definition formulated by a writer on the civil law. Accordingly, the definition of Donat, the great French jurist associated with Pascal and the recluses of Port Royal, has been repeatedly cited by the Louisiana court. It reads: "Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them. In this motive consists the distinction between these and ordinary legacies."[3] In Rhode Island, a charitable trust has been described as one "which originates from a gift, and which limits property to any

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[20] 1877, Ould v. Washington Hospital, 95 U. S. 303, 311, 24 L. Ed. 450 (Affirming 1 MacArthur 541, 29 Am. Rep. 605). Cited 1923, Nixon v. Brown, —— Nev. ——, 214 Pac. 524, 531.

[1] 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 327, 71 Atl. 1032; 1897, Brooks v. Belfast, 90 Me. 318, 329, 38 Atl. 222.

[2] 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 373, 77 Atl. 565; 1917, Haggin v. International Trust Co., 69 Colo. 147, 169 Pac. 138, 140; 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 373, 77 Atl. 565; 1908, Carter v. Whitcomb, 74 N. H. 482, 486, 69 Atl. 779, 17 L. R. A. (N. S.) 733.

[3] 1853, State v. McDonogh, 8 La. Ann. 171, 246; 1886, Williams v. Western Star Masonic Lodge, 38 La. Ann. 620, 629; 1913, Succession of Tilton, 133 La. 435, 439, 63 So. 99.

public use to which it is lawful to devote property forever,"[4] and this definition has been approved by the Kansas court.[5] The Missouri appellate court has defined a charity as "any gift for a beneficial public purpose not contrary to any declared policy of the law,"[6] and this definition has been expanded by the Missouri supreme court as follows: "Any gift, not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, is a charity."[7] This definition has not only been followed by the same court in later cases,[8] but has also been called concise, comprehensive and practical by the Wisconsin court.[9] On account of its inherent value, the following definition of the California court must be accorded a place in this connection: "A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor. It may, but it need not, look to the care of the sick or insane. It may, but it need not, seek to spread religion or piety."[10]

§ 204. **Private Charities.** While all these definitions are helpful and valuable, the inquiry should not stop with them. The principles which lie at the base of the matter must be kept in mind. The distinction between public and private charities must be noted. Donations may be benevolent without being charitable.[11] A gift merely for hospitality[12] or

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[4] 1895, Webster v. Wiggin, 19 R. I. 73, 99, 31 Atl. 824, 28 L. R. A. 510.

[5] 1901, Troutman v. De Boissiere Odd Fellow's Orphans' Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.).

[6] 1883, State v. Academy of Science, 13 Mo. App. 213, 216.

[7] 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 8 S. W. 346.

[8] 1906, Crow v. Clay County, 196 Mo. 234, 260, 95 S. W. 369; 1911, Buchanan v. Kennard, 234 Mo. 117, 139, 136 S. W. 415; 1912, Strother v. Barrow, 246 Mo. 241, 252, 151 S. W. 960.

[9] 1900, Harrington v. Pier, 105 Wis. 485, 521, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[10] 1896, People v. Cogswell, 113 Cal. 129, 138, 45 Pac. 270, 35 L. R. A. 269.

[11] See notes; 14 L. R. A. (N. S.) 1002, 37 L. R. A. (N. S.) 1002, 63 Am. St. Rep. 268.

[12] 1891, Kelly v. Nichols, 17 R. I. 306, 320, 21 Atl. 906, 19 L. R. A. 413; 1892, Kelly v. Nichols, 18 R. I. 62, 65, 25 Atl. 840, 19 L. R. A. 413.

patriotic objects,[13] or to diffuse more generally the blessings of civilization,[14] or to enforce laws enacted to prevent cruelty to children,[15] or to assist the corporation organized to conduct the World's Columbian Exposition,[16] or to preserve, maintain and make improvements on a certain island for the benefit of its private owners,[17] or to keep testator's clock in one of the private rooms of his house in repair,[18] or for a single individual,[19] such as the person who shall care for the testator in his last sickness,[20] or to an agricultural society,[1] do not create charitable trusts. "Effort made, or work done in furtherance of private interest does not become charity, because such effort or work at the same time promotes the public interest."[2] Donations raised by subscriptions for the sufferers from the General Slocum ship disaster in 1904, are for an ascertainable and definite class of beneficiaries so that the law of charitable trusts is not applicable to them.[3] The generous outpourings of money to relieve the inhabitants of a city from the immediate consequences of a disastrous conflagration, making them houseless, homeless, idle and sick in the late autumn with the frosts of a northern winter close by, constitute but a private charity which will not, after the most pressing necessities have been satisfied, be appropriated to the general relief of the poor but will be used to repair the property losses caused as well as to relieve the immediate

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[13] 1915, Washington Camp v. Board of Equalization, 87 N. J. Law 53, 93 Atl. 856.

[14] 1856, Owens v. Missionary Society of M. E. Church, 14 N. Y. (4 Kern) 380, 409, 410, 67 Am. Dec. 160; but see 1833, Magill v. Brown, Fed. Cas. No. 8,952, Brightly N. P. 346, 14 Haz. Reg. Pa. 305.

[15] 1900, People v. New York Society for Prevention of Cruelty to Children, 161 N. Y. 233, 242, 55 N. E. 1063.

[16] 1893, World's Columbian Exposition v. United States, 56 Fed. 654, 670, 6 C. C. A. 58, 18 U. S. App. 42 (Reversing 56 Fed. 630, 640).

[17] 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 950, Ann. Cas. 1918 B. 1204.

[18] 1891, Kelly v. Nicholls, 17 R. I. 306, 319, 21 Atl. 906, 19 L. R. A. 413.

[19] 1864, Sherwood v. American Bible Society, 40 N. Y. (1 Keyes) 561, 4 Abb. Dec. 227, 233; 1856, Owens v. Missionary Society, 14 N. Y. (4 Kern) 380, 397, 67 Am. Dec. 160.

[20] 1916, Lear v. Manser, 114 Me. 342, 96 Atl. 240.

[1] 1907, Logan v. Agricultural Society, 156 Mich. 537, 121 N. W. 485.

[2] 1915, Sutter v. Milwaukee Board of Fire Underwriters, 161 Wis. 615, 617, 155 N. W. 127, Ann. Cas. 1917 E. 682.

[3] 1906, Loch v. Mayer, 100 N. Y. Supp. 837, 839, 50 Misc. 442; 1907, Boenhardt v. Lock, 107 N. Y. Supp. 786, 56 Misc. Rep. 406 (Affirmed 113 N. Y. Supp. 747; 129 App. Div. 355, which is affirmed 198 N. Y. 631; 92 N. E. 1078).

distress.[4] To give a gift the character of a public charity, "there must appear to be some benefit to be conferred upon, or duty to be performed toward, either the public at large or some part thereof, or an indefinite class of persons. When there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity."[5] Where the donee is an individual, a trust of necessity is connected with the gift if a public charity is to result. A mere moral or religious obligation on the part of the donee is not sufficient. Though, therefore, the legatee, a member of a religious community vowed to poverty, regards herself as under a moral obligation to devote all her property to the uses of that community, and though the testatrix probably believed that she would deem herself thus bound, no charitable trust results.[6]

§ 205. **Private and Public Charities.** It is not always easy to distinguish between public and private charities. "The line of distinction which determines where a private charity ends and a public one begins, is at times difficult to locate, and this difficulty has caused much of the apparent want of harmony which prevails among the decisions upon

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[4] 1895, Doyle v. Whalen, 87 Me. 414, 32 Atl. 1022, 31 L. R. A. 118. A similar case has arisen in connection with the death of twenty-one and the injury of eighteen firemen occurring while fighting a fire in the Nelson Morris plant in the Chicago stockyards on December 22, 1910. While the fire was still burning, Bernard E. Sonny, a public-spirited citizen, called together over the telephone a number of Chicago's leading men, who accordingly met at the City Club and at once organized themselves into a "Citizens Relief Committee." On the following day an appeal was made through the newspapers of the city for a fund of $250,000 "to provide properly for the families of the heroic firemen who sacrificed their lives in the protection of property." The committee organized 70 sub-committees and obtained a fund of $211,000 at the nominal expense of $514 for postage and stenographers' services. There were over 2,000 individual contributors, the contributions ranging from 25 cents to $25,000. The apportionment of this fund by the committee among the injured firemen and the families of those who lost their lives at the fire, and the attempt of the committee to invest the fund and pay it out only after a number of years, brought the matter into the Cook County Superior Court. Fennimore Cooper, J., approved of the apportionment made among the beneficiaries, but overruled the committee's contentions on the other branch of the case and ordered the immediate distribution of the funds. Moriarty v. Higginbotham, No. 285,890.

[5] 1875, Old South Society v. Crocker, 119 Mass. 1, 23, 20 Am. Rep. 299.

[6] 1886, Lynch v. Loretta, 4 Dem. Sur. 312, 319 (N. Y.).

the subject."[7] A gift may constitute a public charity, though the fund is sooner or later to be dissipated and lost by its entire distribution.[8] Where a fund is administered by a society, the fact that it may more directly benefit the members of such society than the public at large does not deprive it of its public character.[9] The distinctive characteristics of a public charity are that its funds are derived from gifts and not from dues and assessments, and that its benefits are not confined to designated individuals.[10] While a gift to the twenty-six worn-out preachers then on the rolls of a certain conference would create a private charity, the beneficiaries being certain a gift generally "for the use of the worn-out preachers" of such conference, constitutes a public charity.[11] The same has been held in regard to gifts made to church purposes on the ground that the beneficiaries in such cases are fully defined and capable of vindicating their own rights.[12]

§ 206. **Mutual Benefit Societies.** Mutual benefit societies exist in great numbers and, as their name indicates, are of much benefit to their members. The fact that payments made to them are made for the advantage of their members rather than for the benefit of the public,[13] makes them insurance societies,[14] and excludes them from classification as public

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[7] 1907, Washburn College v. O'Hara, 75 Kans. 700, 703, 90 Pac. 234.

[8] 1848, Wright v. Linn, 9 Pa. (9 Barr.) 433, 436. But see 1846, Kirk v. King, 3 Pa. (3 Barr.) 436, 441.

[9] 1908, Carter v. Whitcomb, 74 N. H. 482, 487, 69 Atl. 779, 17 L. R. A. (N. S.) 733; 1903, Minus v. Billings, 183 Mass. 126, 132, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420.

[10] 1882, Bangor v. Masonic Lodge, 73 Me. 428, 40 Am. Rep. 369. Whether a conveyance for a valuable consideration, adequate or inadequate, with a trust for charitable uses imposed upon it, can be defeated by the trustees on the ground that it is not founded on a gift, see 1915, Bernhardville M. E. Church v. Seney, 85 N. J. Eq. 271, 96 Atl. 388. The Massachusetts court has said that it is the source whence funds are derived, not the purpose to which they are dedicated, which constitutes the charitable use. 1854, Attorney General v. Federal Street Meeting House, 69 Mass. 1, 50 (writ of error dismissed, 66 U. S. 262, 17 L. Ed. 61).

[11] 1916, Buckley v. Monck, 187 S. W. 31, 34 (Mo.).

[12] 1910, Holman v. Renaud, 141 Mo. App. 399, 404, 125 S. W. 843; 1850, Parker v. May, 59 Mass. (5 Cush.) 336, 354; 1854, Attorney General v. Federal Street Meeting House, 69 Mass. (3 Gray) 1, 48 (writ of error dismissed, 66 U. S. (1 Black.) 262, 17 L. Ed. 61).

[13] 1889, Coe v. Washington Mills, 149 Mass. 543, 21 N. E. 966.

[14] 1884, State v. Brawner, 15 Mo. App. 597.

charities.[15] Since their benevolence begins and ends at home,[16] they will not receive recognition as charities though they may contemplate the occasional exercise of charity,[17] and though they aim at the suppression of vice and immorality and at the inculcation of every virtue that renders man noble, great and happy.[18] The question is not whether they may, but whether they must, apply their property to charitable purposes.[19] While their purposes are worthy and benevolent, they are at most private charities, and can lay no claim to any rank as public charities.[20] Of course, where their benevolence goes beyond their members to all the needy English nationals in Philadelphia, they become charities.[1]

§ 207. **Lodges.** Closely akin to mutual benefit societies are the various lodges which have grown up in this country. The question of their status as public charities has sometimes been evaded by the courts,[2] and in other instances has resulted in a holding that such a society is a charitable one. It should not be overlooked, however, that there are peculiarities in all these cases which distinguish them. The most numerous class of such cases relates to the exemption granted to lodges, either from general taxation,[3] or from inheritance taxes.[4] It is perfectly clear that a lodge may well be exempt from taxation without being for that reason a charitable society within the meaning of the statute of Elizabeth. In other

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[15] 1903, Brown v. La Societe Francaise, 138 Cal. 475, 477, 71 Pac. 516; 1835, Babb v. Reed, 5 Rawle 151, 157, 28 Am. Dec. 650 (Pa.); 1836, In re Blenon, 2 Pa. Law. J. 250, 254, Brightly N. P. 338; 1897, Hopkins v. Grimshaw, 165 U. S. 342, 352, 353, 41 L. Ed. 739, 17 S. C. Rep. 401.

[16] 1873, Swift v. Beneficial Society of Easton, 73 Pa. (23 P. F. Smith) 362.

[17] 1903, Brown v. La Societe Francaise, 138 Cal. 475, 477, 71 Pac. 516. For a case in point see 1868, Mayer v. Society for Visitation of Sick, 2 Brewst. 385 (Pa.).

[18] 1885, In re Benezet Joint Stock Ass'n, 17 Phila. 215, 14 Wkly. Notes Cas. 211 (Pa.).

[19] 1911, Moseley v. Smiley, 171 Ala. 593, 596, 55 So. 143.

[20] 1885, Burke v. Roper, 79 Ala. 138, 142.

[1] 1919, In re Lawson, 264 Pa. 77, 107 Atl. 376.

[2] 1900, In re Willey, 128 Cal. 1, 12, 60 Pac. 471; 1911, Tate v. Woodyard, 145 Ky. 613, 615, 140 S. W. 1044.

[3] 1874, Mayor v. Soloman Lodge, 53 Ga. 93; 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522; 1908, Carter v. Whitcomb, 74 N. H. 482, 489, 69 Atl. 779, 17 L. R. A. (N. S.) 733; 1916, Sioux Falls Lodge v. Mundt, 37 S. D. 97, 156 N. W. 799; 1871, State v. Addison, 2 S. C. 499; 1911, Salt Lake Lodge v. Groesbeck, 40 Utah 1, 120 Pac. 192, Ann. Cas. 1914, B. 940; 1884, Petersburg v. Petersburg Benevolent Mechanic's Ass'n, 78 Va. 431, 436.

[4] 1910, Morrow v. Smith, 145 Iowa 514, 124 N. W. 316, 22 Ann. Cas. 1183 and note.

cases, the controversy had grown out of the attempt of the remaining members of a moribund lodge to distribute its property among themselves in the face of a by-law devoting it to the good of the craft, or to the relief of its indigent and distressed members,[5] or out of an attempt of the heirs of the original grantor to recover property granted to it after all its original members are dead.[6] In regard to this line of cases, it may well be questioned whether all the conditions requisite for a technical public trust are present.[7] In an Indiana case in which a lodge was held to be a charity, it appeared that it had through a statute been placed on an equality with churches, congregations and schools.[8] In an early Maine case a gift to a lodge was upheld because the donee was incorporated with power to take.[9] A California decision that a bequest to a lodge "for the use of the widows' and orphans' fund of said lodge" creates a valid charity, no matter whether the lodge itself is a charitable institution, evades the question with which we are dealing and is, therefore, not in point.[10]

§ 208. **Lodges continued.** On reason lodges are not charities within the meaning of the statute of Elizabeth.[11] They are institutions "in whose constructive elements and features and outward work, the general characteristics and attributes of fraternal good fellowship, and benevolence in its larger sense, are manifested rather than those of charity, as that term is understood in the law of charitable uses and trusts."[12] They are bodies which derive their funds not from gifts, testamentary or otherwise, but from dues, fees and assessments, and which have other objects than charity, and are rather mutual benefit associations than charitable institu-

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[5] 1838, Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392.

[6] 1851, King v. Parker, 63 Mass. (9 Cush.) 71; 1848, Vander Volgen v. Yates, 3 Barb. Ch. 242 (Affirmed 9 N. Y. 219, Seld. Notes 186).

[7] 1875, Old South Society v. Crocker, 119 Mass. 1, 24, 20 Am. Rep. 299.

[8] 1875, Cruse v. Axtell, 50 Ind. 49, 57.

[9] 1871, Everett v. Carr, 59 Me. 325, 333.

[10] 1900, In re Willey, 128 Cal. 1, 12, 60 Pac. 471. See, however, 1912, Brown v. Webb, 60 Ore. 526, 533, 120 Pac. 387; Ann. Cas. 1914 A. 148.

[11] 1921, Houston v. Scottish Rite Benevolent Ass'n, —— Tex. Civ. App. ——, 233 S. W. 551.

[12] 1901, Mason v. Perry, 22 R. I. 475, 481, 48 Atl. 671.

tions.[13] Their jewels and regalia, their elaborate schedules of official dignitaries with titles implying important functions and grave duties, inconsistent with and unnecessary for the distribution of charities, their splendid processions, gorgeous rooms, palatial temples, duly guarded doors, mysterious rites, secret signs of recognition, all their rules, regulations and proceedings negative the idea that they are public charities.[14] "The twenty-one cases enumerated in the statute, and the others constructively within it, are of a public nature, tending to the benefit or relief, in some shape or other, of the community at large not restricted to the mutual aid of a few."[15] Though the word "charity" in the language of the poet, the philosopher, and the moralist is capable of many shades of meaning in the legal sense, it does not apply to a Masonic lodge though it encourages charity among its members, and even makes substantial donations to charity where its principal activities are centered on promoting the interests and gratifying the tastes of its own membership.[16] A lodge of Odd Fellows is, therefore, a mutual benefit society rather than a charity.[17]

§ 209. **Abuse of Charitable Funds.** It is no objection to a charity that, from a possible abuse of its administration, an injury may result to society.[18] Nor does it make a difference that out of $63,362 only $20,367,[19] and out of $949,547 only $211,755[20] have reached the beneficiaries, the balance being consumed by the expenses of administration. Where, however, for twenty-three years, in connection with a $100,000 gift, not a single beneficiary has been reached, the property being used solely to provide salaries for the managers, the court has intervened and has checked this perversion.[21] Such

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[13] 1882, Bangor v. Masonic Lodge, 73 Me. 428, 436, 40 Am. Rep. 369. See 1906, Kaufman v. Foster, 3 Cal. App. 741, 745, 746, 86 Pac. 1108.

[14] 1882, Bangor v. Masonic Lodge, 73 Me. 428, 436, 40 Am. Rep. 369.

[15] 1835, Babb v. Reed, 5 Rawle 151, 158, 28 Am. Dec. 650 (Pa.); 1882, Bangor v. Masonic Lodge, **supra.**

[16] 1921, Scottish Rite Bldg. Co. v. Caster County, 106 Neb. 95, 182 N. W. 574.

[17] 1835, Babb v. Reed, 5 Rawle 151, 28 Am. Dec. 650 (Pa.). See note 5 L. R. A. (N. S.) 687.

[18] 1860, Chambers v. St. Louis, 29 Mo. 543, 589.

[19] 1917, American Colonization Society v. Soulsby, 129 Md. 605, 99 Atl. 944, 946, 947.

[20] 1902, St. Louis v. Crow, 171 Mo. 272, 275, 71 S. W. 132.

[21] 1834, **Ex parte** Cassel, 3 Watts 408 (Pa.).

mismanagement of the trust, of course, is no defense to an action brought by it on a note taken by it from an individual for money loaned to him.[22]

§ 210. **Public Policy.** It will not require any extended argument to demonstrate that the purpose to be served by a public charity must be consistent with public policy. Where the object of a trust is to violate the policy of the law, the courts will not permit it to be executed by any instrumentality whatsoever.[23] A donor "cannot devise his property to be burned, or otherwise uselessly destroyed, because such a disposition of it is not only unnatural and unreasonable, but against public policy."[1] A testamentary gift for the teaching of homeopathic medicine, as taught in certain enumerated but out-of-date books, without "subversion or distortion," is void as it must lead to sickness and death and tends to deprive the sick from receiving proper and adequate treatment. "If the bequest had not been limited to instruction in the books mentioned, without subversion and distortion, and had recognized that the principles and methods of these books were to be taught in connection with the modern methods of the homeopathic school, an entirely different question would be presented."[2] A donor will not be permitted to fly in the face of an established public policy no matter how indifferent such policy and humane his motives may be. He could not, while the fugitive slave laws were still in force, make a valid bequest to assist slaves to escape from their owners.[3] While slavery was still a public institution in the Southern states, and was favored by their public policy,[4] a gift of slaves to executors in trust, to have them set free at such time and in such manner as they might think

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22 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 221, 222; 1883, Scott v. Marion Twp., 39 Ohio St. 153.

23 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671, 690 (Affirming 29 N. J. Eq. (2 Stew.) 36). See notes 14 L. R. A. (N. S.) 71, 37 L. R. A. (N. S.) 998.

1 1891, Ford v. Ford, 91 Ky. 572, 577, 16 S. W. 451, 13 Ky. Law. Rep. 183. But see the case noted under Section 198, Note 12, **supra.**

2 1922, **In re** Hill's Estate, 119 Wash. 62, 66, 204 Pac. 1055, s. c. 207 Pac. 689.

3 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 568.

4 1857, American Colonization Society v. Gartrell, 23 Ga. 448; 1858, Lewis v. Lusk, 35 Miss. 401, 419, citing 1856, Lusk v. Lewis, 32 Miss. 297; 1827, Quaker Society v. Dickenson, 12 N. C. (1 Dev. Law) 189.

proper, did not create a charity.[5] Such public policy, of course, may change and when this has happened, a gift void before such change may be valid. An educational charity for the benefit of "poor mutes," created in 1851, when the education of negroes was a criminal offense will, therefore, be presumed to have been made in contemplation of the change that later followed so as to inure thereafter to colored as well as white mutes.[6] Any mere impatience expressed by the donor in regard to the political or legal institutions of the country, however, will not render his gift void as against public policy. He may declare the established system of land tenure to be robbery,[7] or may refer to the United States as an "infamous union"[8] without invalidating his gift. Nor will a donation for the spreading of the doctrine of the New Jerusalem, as such doctrine has been laid down in the writings of Swedenborg, be void because such writings are susceptible of a construction which would make them obnoxious to our standards of morality.[9]

§ 211. **Wisdom.** The wisdom of a charitable donation has sometimes been questioned, and this contention has occasionally been all too sound, without, however, affecting the situation in the least. "The legal status of a charity is not determined by its practical results, which can seldom be foreseen."[10] That the proposed hospital may never have a patient, that the proposed school may never have a scholar, and that the proposed church may never have a worshiper, is no valid objection.[11] That the place provided for by the donor for a mission is not the most appropriate, and that the worshipers will be few is no reason why the charity should not be established.[12] The anticipation of adverse counsel warmed by zeal for their client, such as that of

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[5] 1816, Haywood v. Craven, 4 N. C. 360, 2 Carolina Law Repository 557.

[6] 1895, North Carolina School for Deaf and Dumb v. North Carolina Institute for Deaf, Dumb and Blind, 117 N. C. 164, 169, 23 S. C. 171.

[7] 1889, George v. Braddock, 45 N. J. Eq. (18 Stew.) 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511 (Reversing 44 N. J. Eq. (17 Stew.) 124, 14 Atl. 108).

[8] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 568.

[9] 1910, Kramph's Estate, 228 Pa. 455, 459, 77 Atl. 814.

[10] 1873, Sargent v. Cornish, 54 N. H. 18, 23.

[11] 1886, Crisp v. Crisp, 65 Md. 422, 427, 5 Atl. 421. See 1880, Manners v. Philadelphia Library Co., 93 Pa. 165, 170, 39 Am. Rep. 741.

[12] 1902, Eliot's Appeal, 74 Conn. 586, 603, 51 Atl. 558.

Daniel Webster in the famous Girard case, cannot affect the question.[13] That the church beneficiary of a gift is weak and has disposed of its meeting house since the will was made is beside the question.[14] That a legacy for foreign missions might be more beneficially employed for domestic missions is immaterial.[15] Nor need the success of a charity be sensational, but may be very modest indeed.[16] Where, therefore, a donor's intention is clear and his disposition lawful, the courts have nothing to do with the question of its wisdom.[17] The validity of indefinite trusts "is not to be determined by the opinions of individual judges or of the whole court as to their wisdom or policy, but by the established principles of law; and does not depend merely upon their being for lawful objects, but upon their being of that peculiar nature which the law deems entitled to extraordinary favor because it regards them as charitable."[18] If courts were to attempt to set aside gifts because they regard them as unwise or foolish, they would increase their duties to an uncomfortable extent. A charitable gift may, therefore, be both absurd and valid.[19] "If there be any well-grounded fear, that the patrons of these charities may be made the dupes of designers, or that deserving heirs may be made to suffer, to gratify a bigoted or an ostentatious pietism, it will be for the legislature, and not for the courts to foresee and prevent the evil."[20]

§ 212. **Inadequacy.** The inadequacy of a charitable gift to accomplish its own purpose does not in any manner affect

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[13] See 1921, Wachovia Banking and Trust Co. v. Ogburn, 181 N. C. 324, 107 S. E. 238, 241.

[14] 1913, Rhode Island Hospital Trust Co. v. Newport, 87 Atl. 182 (R. I.).

[15] 1815, Bartlett v. King, 12 Mass. 536, 539, 7 Am. Dec. 99.

[16] 1912, Taylor v. Columbian University, 226 U. S. 126, 136, 33 S. Ct. 73 (Affirming 35 App. Dist. Col. 68).

[17] 1904, Colbert v. Speer, 24 App. D. C. 187, 205 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403); 1854, Gilman v. Hamilton, 16 Ill. (6 Peck.) 225, 230; 1910, Chapman v. Newell, 146 Iowa 415, 425, 125 N. W. 324; 1911, Stewart v. Coshow, 238 Mo. 662, 672, 142 S. W. 283; 1917, Jones v. Patterson, 271 Mo. 1, 195 S. W. 1004; 1916, In re MacDowell, 217 N. Y. 454, 465, 112 N. E. 177; 1918, Rhode Island Hospital Trust Co. v. Benedict, 41 R. I. 143, 103 Atl. 146, 148; 1922, Taylor v. Hoag, 273 Pa. 194, 116 Atl. 826.

[18] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 550.

[19] 1893, Lewis Estate, 152 Pa. 477, 25 Atl. 878.

[20] 1845, American Bible Society v. Wetmore, 17 Conn. 181, 189.

its validity,[21] whatever may be its effect in bringing the **cy pres** doctrine into operation.[22] The donation of a piece of land, therefore, may create a valid charity though no fund is provided to erect a building on it.[1] A gift to be used so as to do the most good to indigent seamen will not be diverted to the heirs merely because it is small.[2] A limitation to one hundred dollars for each beneficiary does not invalidate a bequest.[3] Of course, the acceptance of such a trust by the trustee will not empower the court to compel the raising of other funds to supplement it. Equity will not compel a trustee to assume additional burdens.[4]

§ 213. **Conveyance by one Charity to another.** The relation between charitable institutions of diverse purposes are frequently very close indeed, and sometimes result in conveyances by the one to the other. The question has arisen whether such a conveyance creates a charitable trust. An arrangement by which a university assigned certain property to a hospital, stipulating that the hospital was to employ as surgeons the members of its medical staff and allow its students to observe the actual treatment of patients, has been held not to create a charitable trust but to enable the university better to carry out one of its purposes.[5]

§ 214. **Execution.** A charitable trust may be created by the gift of two notes to trustees with directions not to apply such gift to the charity specified until after the donor's death.[6] Such an act, however, to be effective must amount to an executed gift and must be more than a mere naked promise to make a future donation.[7] "There is no difference in respect to the necessity for a consideration to support a promise made in behalf of a charitable institution, and a promise for any other purpose."[8] A note accompanied by

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[21] 1916, **In re** MacDowell, **supra.** See 1899, **In re** Royer, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, 369, where the court refuses the pass on this question.

[22] See Sections 157 and 158, **supra.**

[1] 1865, Meeting Street Baptist Society v. Hail, 8 R. I. 234.

[2] 1912, Petition of Pierce, 109 Me. 509, 84 Atl. 1070.

[3] 1922, Sherman v. Shaw, 243 Mass. 257, 137 N. E. 374.

[4] 1882, Hathaway v. New Baltimore, 48 Mich. 251, 254, 12 N. W. 186.

[5] 1919, Northwestern University v. Wesley Memorial Hospital, 290 Ill. 205, 125 N. E. 13.

[6] 1911, Telle v. Roever, 159 Mo. App. 115, 139 S. W. 256.

[7] 1861, Phelps v. Pond, 23 N. Y. 69, 78.

[8] 1897, Montpelier Seminary v. Smith, 69 Vt. 382, 386, 38 Atl. 66.

a letter to the payee, an agent of the maker, authorizing him to invest the proceeds of it for the benefit of a certain charity, creates not a power coupled with a trust, but only a power to establish a trust, which power, not being exercised at the death of the testator, is revoked by that event.[9] The gift must, therefore, in any event be executed before a charitable trust can grow out of it. In this respect it does not differ from gifts to other purposes.

§ 215. **Acceptance by Trustee.** The question of the acceptance of a gift rests on different principles where a private and where a charitable trust is involved. No acceptance by the individual beneficiaries of a charity is necessary.[10] A donation by individuals, and its acceptance by the trustee appointed for that purpose, will close the transaction.[11] Such acceptance, of course, must be unconditional.[12] While a gift to a municipality is accepted by a resolution to receive the gift to the extent that it is "authorized by law to accept such donations and perform such conditions,[13] a legacy, on condition to build a public building at a certain place, is rejected by a resolution to build at a different place.[14] In any case the gift is consummated "when the property is actually delivered for a charitable purpose to a third party, with the intent on the part of the donor that the latter's dominion over it has thereby ceased."[15]

§ 216. **Acceptance by Beneficiary.** The trustee is the mere instrument through which a gift reaches the ultimate beneficiaries. Where this has been accomplished, where a charity has been bestowed on an individual and has been accepted by him, it cannot be recovered though it be found that he has property of his own. Therefore, where an orphan asylum has given board and schooling to an orphan as a gratuity, it cannot recover the sum thus spent from his estate.[16]

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[9] 1909, Organized Charities Ass'n v. Mansfield, 82 Conn. 504, 74 Atl. 781, 135 Am. St. Rep. 285.

[10] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 794.

[11] 1905, School Trustees of Hoboken v. Hoboken, 70 N. J. Eq. 630, 634, 62 Atl. 1.

[12] 1885, Appeal of Gumbert, 110 Pa. 496, 501, 1 Atl. 437.

[13] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 789.

[14] 1870, Jacobs v. Bradley, 36 Conn. 365.

[15] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 795.

[16] 1907, Louisville Presbyterian Orphanage v. Chamber's Guardian, 31 Ky. Law. 934, 104 S. W. 319; 1882, St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86, 3 Ky. Law. Rep. 573.

§ 217. **Wills, Deeds, Dedication and Subscription.** There are many instruments by which a charitable trust may be created. It is human nature for owners to cling to their property while they live and to devote it to charity only thereafter. While there are noteworthy exceptions, the great bulk of charities, at least those that come before the courts, are, therefore, created by wills. The proposition that a charity can be created by a will is, therefore, so clear that no cases to support it will be cited. Probably nine-tenths of all the cases involving charitable trusts have arisen under wills. This leaves, however, a percentage of charities created **inter vivos**[17] by other means such as deeds,[18] dedications,[19] and subscriptions.[20] A charitable fund may be raised by in-

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[17] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 798.

[18] 1896, Spence v. Widney, 46 Pac. 463 (Cal.); 1896, People v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; 1887, Storr's Agricultural School v. Whitney, 54 Conn. 342, 8 Atl. 141; 1905, Thompson v. Hale, 123 Ga. 305, 51 S. E. 383; 1895, Alden v. St. Peter's Parish, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232; 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315; s. c. 4 Iowa 252; 1901, Troutman v. De Boissiere Odd Fellow's Orphans' Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.); 1851, Earle v. Wood, 62 Mass. (8 Cush.) 430, 445; 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 41 N. E. 231; 1899, Balch v. Attorney General, 174 Mass. 144, 54 N. E. 490; 1918, Amory v. Amherst College, 229 Mass. 374, 118 N. E. 933; 1875, Orford Union Congregational Society v. West Congregational Society, 55 N. H. 463; 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; 1923, Nixon v. Brown, —— Nev. ——, 214 Pac. 524, 532; 1888, Mannix v. Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753; 1887, Raley v. Umatilla County, 15 Ore. 172, 13 Pac. 890, 3 Am. St. Rep. 142; 1844, Pownall v. Myers, 16 Vt. 408; 1856, Brooke v. Shacklett, 54 Va. (13 Grat.) 301, 309, 310. This last case is a direct decision on the question, while the other cases cited merely recognize charities created by deeds. Where a lot is sold for a valuable and presumptively commensurate consideration, the vendors cannot claim to be the donors of a charity. 1898, Carroll County Academy v. Gallatin Academy Co., 104 Ky. 621, 627, 20 Ky. Law. Rep. 824, 47 S. W. 617; 1847, Gibson v. Armstrong, 46 Ky. (7 B. Mon.) 481, 490. Whether a nominal consideration for a deed to charity has actually been paid or not is immaterial. 1912, Mott v. Morris, 249 Mo. 137, 143, 144, 155 S. W. 434. A deed for the purpose of having a school erected and maintained on the land shows a sufficient consideration. 1847, Castleton v. Langdon, 19 Vt. 210, 216.

[19] 1839, Antones v. Eslava, 9 Port. 527, 545 (Ala.); 1880, Carpenteria School District v. Heath, 56 Cal. 478; 1835, Chattam v. Brainerd, 11 Conn. 60, 87; 1890, Campbell v. Kansas City, 102 Mo. 326, 345, 346, 13 S. W. 897, 10 L. R. A. 593; 1836, Bryant v. McCandless, 7 Ohio (7 Ham.) Part 2, 135; 1865, McLain v. School Directors of White Twp., 51 Pa. (1 P. F. Smith) 196; 1829, Beatty v. Kurtz, 27 U. S. (2 Pet.) 566, 583, 7 L. Ed. 521 (affirming Fed. Cas. No. 7,950, 2 Cranch C. C. 699).

[20] 1837, Langdon v. Plymouth Congregational Society, 12 Conn.

numerable small contributions and donations extending over many years.[1] A subscription by non-members to help a lodge build a building, part of which is to be devoted to school purposes, therefore, creates a valid charity.[2]

§ 218. **Other Means of creating Charities.** These standard means of creating charities do not exhaust the possibilities. Charities may be created by agreement,[3] by letter,[4] by verbal promise,[5] by promissory note,[6] by the delivery of title deeds,[7] by gift **causa mortis** to close confident,[8] by an instrument insufficient as, though intended for, a deed[9] by a grant made by a township,[10] or by the United States,[11] or by the vote of a society,[12] by a declaration of trust,[13] separate from and subsequent to a deed,[14] and even by fairs, concerts and

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113; 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780; 1836, Bluehill Academy v. Witham, 13 Me. (1 Shep.) 403; 1919, Eliot v. Trinity Church, 232 Mass. 517, 122 N. E. 648; 1828, Amherst Academy v. Cowls, 23 Mass. (6 Pick.) 427, 438, 17 Am. Dec. 387; 1855, Harvard College v. Society for Promoting Theological Education, 69 Mass. (3 Gray) 280; 1907, Sears v. Attorney General, 193 Mass. 551, 79 N. E. 772; 1885, McRoberts v. Moudy, 19 Mo. App. 26; 1848, Beaver v. Filson, 8 Pa. (8 Barr.) 327; 1845, Kingsley v. School Directors of Plum Twp., 2 Pa. (2 Barr) 28; 1888, Bates v. Palmetto Society, 28 S. C. 476, 6 S. E. 327; 1857, Hopkins v. Upshur, 20 Tex. 89, 95, 70 Am. Dec. 375; 1895, Clark v. Oliver, 91 Va. 421, 425, 22 S. E. 175. See 23 Yale Law J. 95; 48 L. R. A. (N. S.) 783.

[1] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 31 Pac. 436 (reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44).

[2] 1908, Rhodes v. Maret, 112 S. W. 433, 435 (Tex. Civ. App.).

[3] 1910, Girard Trust Co. v. Russell, 179 Fed. 446, 102 C. C. A. 592 (affirming 171 Fed 161). But see 1910, Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 348, 51 So. 947.

[4] 1832, American Academy v. Harvard College, 78 Mass. (12 Gray) 582.

[5] 1913, Young Men's Christian Ass'n v. Estill, 140 Ga. 291, 78 S. E. 1075, Ann. Cas. 1914 D. 136.

[6] 1894, Durrell v. Belding, 9 Ohio Cir. Ct. Rep. 74, 76, 4 Ohio C. D. 263. Where a note is given to an educational institution and the only consideration claimed for it is that the money be devoted to its charitable objects, such implied promise to do what it is already legally bound to do constitutes no consideration for the note. 1897, Montpelier Seminary v. Smith, 69 Vt. 382, 386, 38 Atl. 66.

[7] 1872, Pringle v. Dorsey, 3 S. C. 502, 508.

[8] 1908, Gilmore v. Lee, 237 Ill. 402, 414, 86 N. E. 568.

[9] 1910, Francis v. Preachers' Aid Society, 149 Iowa 158, 166, 126 N. W. 1027; 1841, Morrison v. Beirer, 2 Watts and S. 81 (Pa.).

[10] 1821, Shapleigh v. Pilsbury, 1 Me. (1 Greenl.) 271.

[11] 1916, Albuquerque Board of Education v. School District No. 5, 21 N. M. 624, 157 Pac. 668.

[12] 1889, Coe v. Washington Mills, 149 Mass. 543, 21 N. E. 966.

[13] 1910, Brice v. All Saints Memorial Chapel, 31 R. I. 183, 194, 76 Atl. 774; 1908, Storey v. Knapp, 30 Ohio Cir. Ct. Rep. 684, 20 Ohio Cir. Ct. Dec. 684.

[14] 1883, Ireland v. Geraghty, 15 Fed. 35, 11 Biss. 465.

the like.[15] Whether the property of a church is the product of private contributions, or of taxes imposed, or of profits from business operations of the church, or of appreciation in value, a charitable use is stamped upon it in an indelible manner by charter, ordinance, regulation and usage.[16] A clause in the covenant of a communistic society, however giving its trustees power to make charitable donations, does not affect the question whether a use is charitable.[17]

§ 219. **Pay by Beneficiaries.** The charitable character of a gift is not necessarily affected by the fact that the institution which is to administer it does not extend its services free to all the members of its class of beneficiaries. "The circumstance that the use of the property is free, is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public whether compensation be exacted or not."[18] It is neither usual nor desirable to confine the administration of a hospital exclusively to the indigent.[19] An institution which is in its nature a public charity does not lose such character though an income is received from its beneficiaries.[20] It is none the less a charity because it is discriminating.[21] "Furnishing board, lodging and nursing to needy persons is among the most familiar and useful of charities, and that which constitutes such an institution a charity is that it does not furnish these things for profit."[22] An institution from which the rich are not turned away because of their wealth, nor the poor because of their poverty is, therefore, a public charity,[1] so long as payments

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[15] 1869, Morton v. Smith, 68 Ky. (5 Bush) 467; 1876, Bethlehem v. Perseverance Fire Co., 81 Pa. (31 P. F. Smith) 445, 457.

[16] 1889, Mormon Church v. United States, 136 U. S. 1, 50, 34 L. Ed. 478, 10 S. C. Rep. 792 (affirming 5 Utah 361; 15 Pac. 473).

[17] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 179, 180, 26 Am. Dec. 446.

[18] 1874, Gerke v. Purcell, 25 Ohio St. 229, 241.

[19] 1901, Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294, 295, 47 C. C. A. 122, 65 L. R. A. 372 (Affirming 101 Fed. 896).

[20] 1892, Episcopal Academy v. Philadelphia, 150 Pa. 565, 574, 25 Atl. 55.

[21] 1881, Girl's Industrial Home v. Fritchey, 10 Mo. App. 344, 351.

[22] 1872, Gooch v. Association for Relief of Aged Indigent Females, 109 Mass. 558, 567.

[1] 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 326, 71 Atl. 1032.

received from patients or other beneficiaries are devoted to the general purposes of the charity and not to the private benefit of individuals or corporations.[2] "By this operation, the funds of the institution are not absorbed, but augmented; the charitable object of the asylum is not diminished, but promoted; and the nature of it is not changed but pursued."[3] The partial payment by students of the cost of educating them "makes it possible to extend the benefits of the University to a larger body of men and women in search of education than would otherwise be the case, and so long as such contributions are not unreasonable and are not in such an amount that it could be said that the benevolence in the foundation is no longer substantially reflected in the benefits which it confers, then the institution is still charitable."[4] Charity, therefore, has a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefit. "Reason and authority are opposed to the proposition that an institution otherwise charitable will be deprived of that character by the mere fact that charges for facilities and services are made to individual members, which not only do not result in profit, but which fail, in the aggregate, even to make the institution self-sustaining."[5]

§ 220. **Pay by Beneficiaries. Illustrations.** It will not be difficult to illustrate this principle by concrete cases. Settlement work does not cease to be charitable because nominal fees are or may be charged.[6] Corporations may be charitable though some income is received from their beneficiaries.[7] A library from which non-members may receive books for a nominal consideration may be a public charity, though members are entitled to these privileges free of charge.[8] A "club" founded by a gift and maintaining a library and educational and recreation features is a charity, though it is supported

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[2] 1908, Fordham v. Thompson, 144 Ill. App. 342, 347.

[3] 1822, American Asylum v. Phoenix Bank, 4 Conn. 172, 178, 10 Am. Dec. 112.

[4] 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 374, 204 App. Div. 664.

[5] 1921, In re Y. M. C. A. Assessment, 106 Neb. 105, 182 N. W. 593, 595.

[6] 1911, Starr v. Selleck, 130 N. Y. Supp. 693, 696, 145 App. Div. 869 (affirmed 205 N. Y. 545, 98 N. E. 1116).

[7] 1883, Quinn v. Shields, 62 Iowa 129, 17 N. W. 437, 49 Am. Rep. 141.

[8] 1909, Hilliard v. Parker, 76 N. J. Eq. 447, 451, 74 Atl. 447.

in part by the contributions of its members.[9] The same holds good of the Young Men's Christian Association[10] or the Young Women's Christian Association,[11] of a hospital,[12] of educational institutions,[13] such as universities,[14] colleges,[15] negro institutes,[16] medical[17] and denominational[18] schools, and of homes,[19] whether they are for children,[20] or old people,[21] or

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[9] 1915, Kimberly's Estate, 249 Pa. 483, 491, 95 Atl. 86.

[10] 1913, Young Men's Christian Association v. Estill, 140 Ga. 291, 294, 78 S. E. 1075, Ann. Cas. 1914 D. 136; 1908, Carter v. Whitcomb, 74 N. H. 482, 488, 69 Atl. 779, 17 L. R. A. (N. S.) 733; 1878, Goodell v. Union Ass'n of Children's Home, 29 N. J. Eq. (2 Stew.) 32, 35. See Note 25 Ann. Cas. 427.

[11] 1889, Philadelphia v. Women's Christian Ass'n, 125 Pa. 572, 579, 17 Atl. 475.

[12] 1915, Mason County v. Hayswood Hospital, 167 Ky. 17, 19, 179 S. W. 1050; 1910, Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 411, 412, 78 Atl. 898, 38 L. R. A. (N. S.) 141; 1876, McDonald v. Massachusetts General Hospital, 120 Mass. 432, 435, 21 Am. Rep. 529; 1919, Boston Safe Deposit and Trust Co. v. Attorney General, 234 Mass. 261, 125 N. E. 392; 1920, Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 175 N. W. 699; 1913, McInerny v. St. Luke's Hospital, 122 Minn. 10, 13, 141 N. W. 837; 1894, Downes v. Harper Hospital, 101 Mich. 555, 560, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; 1907, Adams v. University Hospital, 122 Mo. App. 675, 688, 99 S. W. 453; 1912, Duncan v. Nebraska Sanitarium Benevolent Ass'n, 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913 E. 1127; 1906, Noble v. Hahneman Hospital, 98 N. Y. Supp. 605, 112 App. Div. 663, 18 N. Y. Ann. Cas. 365; 1911, Taylor v. Protestant Hospital Ass'n, 85 Ohio St. 90, 98, 96 N. E. 1089; 1900, Conner v. Sisters of the Poor, 10 Ohio S. and C. P. Dec. 86, 7 Ohio N. P. 514; 1914, Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S. E. 13, 51 L. R. A. (N. S.) 1025; 1916, Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 Pac. 385, Ann. Cas. 1918 E. 1172.

[13] 1896, People v. Cogswell, 113 Cal. 129, 139, 45 Pac. 270, 35 L. R. A. 269; 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 794; 1877, Stevens v. Shippen, 28 N. J. Eq. (1 Stew.) 487, 533 (affirmed 29 N. J. Eq. 602, which is affirmed 106 U. S. 505, 1 S. Ct. 200, 27 L. Ed. 139); 1912, Hill v. Tualatin Academy, 61 Ore. 190, 196, 121 Pac. 901; 1921, Barr v. Brooklyn Children's Aid Society, 190 N. Y. Supp. 296.

[14] 1905, Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556 (affirming 121 Ill. App. 512); 1900, Alfred University v. Hancock, 69 N. J. Eq. 470, 471, 46 Atl. 178; 1866, Miller v. Porter, 53 Pa. (3 P. F. Smith) 292, 301.

[15] 1886, Willard v. Pike, 59 Vt. 202, 216, 9 Atl. 907.

[16] 1907, Alston v. Waldon Academy, 118 Tenn. 24, 27, 38, 102 S. W. 351, 11 L. R. A. (N. S.) 1179.

[17] 1901, Collins v. New York Post-Graduate Medical School and Hospital, 69 N. Y. Supp. 106, 109, 59 App. Div. 63.

[18] 1913, Burke v. Burke, 259 Ill. 262, 270, 102 N. E. 293; 1892, Episcopal Academy v. Philadelphia, 150 Pa. 565, 574, 25 Atl. 55.

[19] 1916, In re MacDowell, 217 N. Y. 454, 464, 112 N. E. 177.

[20] 1914, Horton v. Tabitha Home, 95 Neb. 491, 145 N. W. 1023, Ann. Cas. 1915 D. 1139; 1909, Cunningham v. Sheltering Arms, 119 N. Y. Supp. 1033, 135 App. Div. 178.

[21] 1886, German Aged People's Home v. Hammerbacker, 64 Md. 595, 605, 3 Atl. 678, 54 Am. Rep. 782; 1900, Sherman v. Congregational Home Missionary Society, 176 Mass. 349, 351, 57 N. E. 702;

working girls,[1] or epileptics.[2] A hospital and sanitarium which has attracted a large number of paying patients, some of whom use it merely as a health resort, but which also takes patients at reduced rates or gratuitously, and applies all its income to promote charity, is likewise a charity,[3] and its character as such is not affected by the fact that physicians receive pay for treatment given within its walls,[4] or that it operates as part of its plant a carpenter shop.[5] Where, therefore, a gift is made for the establishment of a public hospital, the trustees may prescribe fees to be paid by the patients. "The absence of a provision for the maintenance of the hospital is inconsistent with the purpose that the treatment should be free and consistent with its self-support."[6] This, however, does not imply that a hospital may "receive pay patients in such numbers as to exhaust its accommodations, so that it cannot receive and extend hospital service to the usual and ordinary number of indigent patients applying for admission."[7]

§ 221. **Classes of Charities. Consequences.** The three great charitable objects, learning, piety and benevolence, may all be the aim of a single gift, or may exist entirely aside from each other. A gift may be a charity though it does not provide for educational purposes,[8] though it makes no provision for the poor, maimed and decrepit,[9] or for the hungry, naked, sick and homeless,[10] or though any religious elements are absolutely absent from it.[11] An institution may be char-

1914, Horton v. Tabitha Home, 95 Neb. 491, 498, 145 N. W. 1023, Ann. Cas. 1915 D. 1139; 1908, Carter v. Whitcomb, 74 N. H. 482, 488, 69 Atl. 779, 17 L. R. A. (N. S.) 733; 1857, Cresson v. Cresson, Fed. Cas. No. 3,389, page 809, 6 Am. Law. Reg. 42, 5 Pa. Law. J. Rep. 431, 5 Clark 431.

[1] 1909, Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 486; 1904, In re Daly, 208 Pa. 58, 64, 57 Atl. 180.

[2] 1910, In re Moore, 122 N. Y. Supp. 828, 66 Misc. Rep. 116 (affirmed 128 N. Y. Supp. 1135, 143 App. Div. 973).

[3] 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 341, 91 N. E. 385.

[4] 1917, O'Brian v. Physician's Hospital Ass'n, 96 Ohio St. 1, 116 N. E. 975, 976, L. R. A. 1917 F. 741.

[5] 1918, Zoulalian v. New England Sanitarium, 230 Mass. 102, 119 N. E. 688, L. R. A. 1918 F. 185.

[6] 1922, Harter v. Johnson, 122 S. C. 96, 115 S. E. 217, 230.

[7] 1917, O'Brian v. Physician's Hospital Ass'n, 96 Ohio St. 1, 116 N. E. 976, 977, L. R. A. 1917 F. 741.

[8] 1896, Smith's Estate, 5 Pa. Dist. Rep. 327, 328 (affirmed 181 Pa. 109, 37 Atl. 114).

[9] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 180, 26 Am. Dec. 446.

[10] 1896, Smith's Estate, **supra.**

[11] 1866, Miller v. Porter 53 Pa. (3 P. F. Smith) 292, 301.

itable though it is declared by the donor not to be eleemosynary.[12] A charity for religious and educational purposes will even be perverted by leasing the property without rent to a poor widow for seven years as a residence, thus allowing one generation to grow up without education and another to sink into the grave without religious consolation.[13] A corporation chartered for "relief of the indigent Jews in Jerusalem" cannot take as an educational charity.[14] An attempt to use a fund given for school purposes for religious purposes will be considered as a breach of trust.[15] A clear distinction exists between the various classes of charities. While all have their rise and owe their fulfillment to the same source—human benevolence—they are quite distinct in their aims.[16] While the betterment of human conditions is the ultimate aim of all of them, religious and educational charities apply themselves very largely to the heart and mind, while eleemosynary charities are almost exclusively confined to the relief of bodily needs. It follows that the religious opinions of the founders are not of equal importance as applied to the various classes of charities. In religious charities they are of paramount importance; in educational charities they are of value only where religious instruction is contemplated; in eleemosynary charities they may be disregarded.[17]

§ 222. **Validity of Gifts to destroy Religion.** It has been seen that a public trust must be consistent with public policy. Whether a gift whose purpose is to tear down religion and religious sentiment will be enforced, is an important question in this land of religious liberty. The famous Girard will case decides that the fact that the donor of an orphan college provides for but partial and imperfect instruction in the truths of Christianity, excluding all ecclesiastics as teachers, and limiting the religious instruction to pure morality, love of truth, sobriety and industry, does not make the gift void.[18]

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[12] 1857, Cresson v. Cresson, Fed. Cas. No. 3,389, page 809, 6 Am. Law. Reg. 42, 5 Pa. Law. J. Rep. 431, 5 Clark 431.

[13] 1853, Pickle v. McKissick, 21 Pa. (12 Harris) 232, 236.

[14] 1889, Riker v. Leo, 115 N. Y. 93, 21 N. E. 719 (Reversing 48 Hun. 620, 1 N. Y. Supp. 128, 15 N. Y. St. Rep. 932).

[15] 1819, Bailey v. Lewis, 3 Day 450 (Conn.).

[16] 1889, Riker v. Leo, 115 N. Y. 93, 98, 21 N. E. 719 (Reversing 48 Hun. 620, 1 N. Y. Supp. 128, 15 N. Y. St. Rep. 932).

[17] 1868, Attorney General v. Moore, 19 N. J. Eq. (4 C. E. Green) 503, 510, 515 (Affirming 18 N. J. Eq. (3 C. E. Green) 256).

[18] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 197, 11 L. Ed. 205.

A gift for "the purchase of books upon the philosophy of spiritualism, not sectarian or of any creed, church or dogma, but of free liberal bearing," has been held valid as a charity of an educational character.[19] A donation to the editor of the "Boston Investigator," whose object was to promote the cause of freedom and humanity and oppose superstition, priestcraft, bigotry, and every kind of mental tyranny, has been construed as an absolute gift.[20] A gift to promote the principle "that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action," has been upheld as a valid charity.[1] On the other hand, gifts to a voluntary association of free-thinkers and anti-sectarians interested in the study of ancient religions, astrology, mysticism and occult science,[2] or to the "Infidel Society" in Philadelphia for a hall for the free discussion of religion, politics, etc.,[3] have been held to be too vague to be executed by the courts. It is not easy to see how love to God or man can be promoted by the dissemination of infidelity which robs men of faith and hope, if not of charity also.[4] Therefore, the Pennsylvania court has concluded that "a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality or hostility to the existing form of government. A man may do many things while living which the law will not do for him after he is dead. He may deny the existence of a God, and employ his fortune in the dissemination of infidel views. But should he leave his fortune in trust for such purposes, the law will strike down the trust as **contra bonos mores.**"[5]

§ 223. **Public defined.** The meaning of the word "public" in connection with public charities must not be stretched unduly. Property devoted to a public charity, though it may be exempt from taxation and damage liability,[6] is not public

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19 1901, Jones v. Watford, 64 N. J. Eq. 785, 53 Atl. 397 (Affirming 62 N. J. Eq. 339, 50 Atl. 180).

20 1891, **In re** Knight, 10 Pa. Co. Ct. Rep. 225, 230.

1 1915, **In re** Bowman, 113 L. T. Rep. 1095; cited 25 Jale Law. J. 503.

2 1909, Korsstrom v. Barnes, 167 Fed. 216.

3 1870, Zeisweiss v. James, 63 Pa. (13 P. F. Smith) 465, 468, 3 Am. Rep. 558.

4 1870, Zeisweiss v. James, **supra.**

5 1880, Manners v. Philadelphia Library Co., 93 Pa. 165, 172, 39 Am. Rep. 741.

6 See Chapters 18 and 19, **infra.**

in such a sense that a mortgage against it cannot be foreclosed and good title conveyed to the purchaser at the foreclosure sale.[7] The fact that the state also has made a contribution to the charity will make no difference.[8]

§ 224. **Religion and Charity not antagonistic.** Religion and charity are not distinct or antagonistic purposes. Though, therefore, an individual who mingles his private money indistinguishably with funds held in trust by him loses the whole, the officers of a religious society who mingle eleemosynary with religious trust funds do not forfeit the funds to either use exclusively. The court will separate the mass as best it can.[9]

§ 225. **Summary.** Public charities are the result of gifts executed by one or more persons **inter vivos,** or by will for the benefit of unascertained, uncertain, and sometimes fluctuating classes of beneficiaries, and have for their object piety, learning, benevolence and municipal advantages in their ever-varying diversity. Their purposes, while they do not embrace all the good affections of the human heart, are not confined to mere poor relief, but encompass the moral, mental, and physical upbuilding of social man. While they must be consistent with existing law, while their beneficiaries must be uncertain, they may, but need not confine themselves to any one of the purposes mentioned; they may, but need not bring themselves within the letter of the statute of Elizabeth; they may, but need not be free from the stain or taint of personal selfishness; they may, but need not be wise or confined to the poor; they may, but need not confer a gratuitous benefit; they may, but need not be of themselves sufficient to accomplish their own purposes.

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[7] 1860, Philadelphia v. Bicknell, 35 Pa. 123.

[8] 1894, Commonwealth v. Louisville Trust Co., 26 S. W. 582, 16 Ky. Law Rep. 131.

[9] 1866, Attorney General v. Old South Society, 95 Mass. (13 Allen) 474.

CHAPTER V

RELIGION

§ 235. **Religious Charities. Difficulties.** The recognition of religious as distinguished from eleemosynary and educational charities, in this country of religious liberty, is attended with no little difficulty. Both eleemosynary and educational charities are being more and more taken over by the state, and are thus assimilated to charities conducted by the state itself. The situation is entirely different in regard to religious purposes. In this important field the development is in the opposite direction. Religious activities have been divorced from state control by constitutional provisions, statutory enactments, court decisions and the general course of our history. The separation of state and church which has resulted is one of the chief outstanding characteristics of our American institutions. While, therefore, religious purposes are universally recognized in America as charitable,[1] they stand

[1] 1912, Crim v. Williamson, 180 Ala. 179, 181, 60 So. 293 (Dowell, C. J., dissenting); 1908, Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 218, 110 S. W. 1042, 126 Am. St. Rep. 1088; 1896, Christ Church v. Trustees of Donations and Bequests, 67 Conn. 554, 565, 35 Atl. 552; 1909, Hewitt v. Wheeler School and Library, 82 Conn. 188, 72 Atl. 935; 1922, Brinsmade v. Beach, 98 Conn. 322, 119 Atl. 233; 1895, Alden v. St. Peter's Parish, 158 Ill. 631, 638, 42 N. E. 392, 30 L. R. A. 232; 1911, French v. Calkins, 252 Ill. 243, 258, 96 N. E. 877; 1859, Scott v. Stipe, 12 Ind. 74; 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315; s. c. 4 Iowa 252; 1901, Zion Church v. Parker, 114 Iowa 1, 8, 86 N. W. 60; 1846, Catholic Church of Taylorville v. Offcutt, 45 Ky. (6 B. Mon.) 535; 1913, Succession of Villa, 132 La. 714, 717, 61 So. 765; 1915, Succession of Percival, 137 La. 203, 68 So. 409; 1839, First Congregational Society v. Trustees of Funds in Raynham, 40 Mass. (23 Pick.) 148; 1885, Hinkley v. Thatcher, 139 Mass. 477, 488, 1 N. E. 840, 52 Am. Rep. 719; 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 197, 41 N. E. 231; 1914, Crawford v. Nies, 220 Mass. 61, 107 N. E. 382; 1880, Allen v. Duffie, 43 Mich. 1, 9, 4 N. W. 427, 38 Am. Rep. 159; 1912, Mott v. Morris, 249 Mo. 137, 147, 155 S. W. 434; 1885, McRoberts v. Moudy, 19 Mo. App. 26; 1909, Lyford v. Laconia, 75 N. H. 220, 222, 223, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680; 1857, Ludham v. Higbee, 11 N. J. Eq. (3 Stockt.) 342; 1896, Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594; 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; 1909, In re St. Michael's Church, 76 N. J. Eq. 524, 527, 74 Atl. 491; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 283, 25 Pac. 720; 1861, McLean v. Wade, 41 Pa. (5 Wright) 266, 269; 1882, Appeal of Fidelity Insurance Trust and Safe Deposit Co., 99 Pa. 443; 1885, Appeal of Gumbert, 110 Pa.

by themselves distinct from the other great charities,[2] since the state cannot lawfully conduct them itself.[3] The employment of chaplains, in penitentiaries and reformatories by the various states, and in the army and navy by the United States, is the only outstanding survival of the old system of state control over religion, and rests more on the dependent status of the beneficiaries, whether they are convicted or enlisted, than on any compliance with the letter or spirit of the constitutional mandates.

§ 236. **Statute of Elizabeth.** Very little light is thrown on religious charities by the statute of Elizabeth. Though most of the charities of the middle ages were of a religious character, the reference to them in the statute is surprisingly scanty. "No kind of charitable trusts finds less support in the words of the statute of 43 Elizabeth than the large class of pious and religious uses, to which the statute contains no more distinct reference than in the words 'repairs of churches.' "[4] It has been said that this omission was intentional, in order to avoid confiscation in case the reformation went backward.[5] Whatever the reason may be, it is certain that "religious uses are clearly not within the strict words of the statute, and can only be brought within its purview by the largest extension of its spirit."[6] Such extension, however, has been made and religious uses recognized from the earliest period of our history.[7] Man's spiritual, as distinguished from his mental and physical needs, are thus clearly recognized.[8]

496, 501, 1 Atl. 437; 1904, Gladding v. St. Matthew's Church, 25 R. I. 628, 636, 57 Atl. 860, 65 L. R. A. 225, 105 Am. St. Rep. 904; 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 108, 1 Rich. Law. 176 Note (S. C.); 1873, Cobb v. Denton, 65 Tenn. (6 Baxt.) 235; 1857, Hopkins v. Upshur, 20 Tex. 89, 95, 70 Am. Dec. 375; 1881, Tunstall v. Wormley, 54 Tex. 476;1867, Venable v. Coffman, 2 W. Va. 310, 320; 1866, Stanley v. Colt, 72 U. S. (5 Wall.) 119, 18 L. Ed. 502. But see 1837, State v. Walter, 2 Har. 151 (Del.).

[2] 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 242, 110 N. W. 951, 10 L. R. A. (N. S.) 74. Says the Kentucky Court: "No one would deny that churches are maintained for or conduce to the advancement of the public good." 1922, Sage v. Commonwealth, 196 Ky. 257, 244 S. W. 779.

[3] 1907, Washburn College v. O'Hara, 75 Kans. 700, 703, 90 Pac. 234.

[4] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 552.

[5] 1905, Biscoe v. Thweatt, 74 Ark. 545, 549, 550, 86 S. W. 432. See Section 190, **supra.**

[6] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 554.

[7] 1821, Shapleigh v. Pilsbury, 1 Me. (1 Greenl.) 271, 281.

[8] 1921, Rhodes v. Yates, 27 N. M. 489, 202 Pac. 698.

§ 237. **Reason for recognizing Religious Charities.** The reason why religious gifts are recognized as public charities is not far to seek. "Surely in a Christian country like ours, it is not against public policy, or the spirit of our laws, for a man to donate to trustees, a lot of ground, to be held and appropriated by them and their successors, in perpetuity, for the use and benefit of a religious denomination as a place of worship."[9] Philanthropy and benevolence are incident to most, if not all, religions in the world, and as naturally accompany the practice of the Christian religion as pure thoughts and pure deeds flow from pure hearts.[10] Every Christian church has, therefore, been said to be a "hospital for souls."[11] Religion itself has been said to be but part and parcel of charity for the purposes of jurisprudence.[12] In its primary sense, religion (from **religare** to rebind, to bind back) imports, as applied to moral questions, a recognition of a conscientious duty to recall and obey restraining principles of conduct.[13] The more truly religious, therefore, a person is, the more desirable will he be as a citizen. Religion is the surest basis on which to rest the superstructure of social order, though not every religious creed in its practical results is equally beneficial to man.[14] "The uplifting of men, women and children to the standard of life taught in the scriptures is indeed a work of charity, the greatest of the three Christian graces."[15] Since piety is thus universally recognized as a valuable constituent in the character of our citizens, "the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed as what is not only estimable in itself, but as an

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[9] 1856, Grissom v. Hill, 17 Ark. 483, 488; 1889, Trustees v. Guthrie, 86 Va. 125, 145, 10 S. E. 318, 6 L. R. A. 321; 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 763.

[10] 1910, San Antonio v. Salvation Army, 127 S. W. 860, 862 (Tex. Civ. App.).

[11] 1912, Strother v. Barrow, 246 Mo. 241, 252, 151 S. W. 960. Says the Massachusetts Court: "It is now thoroughly settled that a gift to a church generally creates a public charity. The word 'church' in this connection includes an incorporated religious society as well as the narrower definition." 1923, McNeilly v. First Presbyterian Church, 243 Mass. 331, 137 N. E. 691, 694.

[12] 1912, Strother v. Barrow, 246 Mo. 241, 249, 151 S. W. 960.

[13] 1881, In re Hinkley, 58 Cal. 457, 512.

[14] 1842, Holland v. Peck, 37 N. C. (2 Ired. Eq.) 255, 528.

[15] 1904, Humphreys v. State, 70 Ohio St. 67, 77, 70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888, 1 Ann. Cas. 233.

appurtenance to the characters of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community.''[16] The spiritual interest of a certain population is clearly a charitable purpose.[17]

§ 238. **Other Reasons for such Recognition.** The high value of religion to the state is not the only reason why pious uses are recognized. Religious societies, not being supported by the state, are dependent on the contributions of individuals. The law, therefore, must consider such contributions as in a peculiar degree charitable.[18] Religious uses are also strictly analogous to other charitable trusts in the important particular of indefiniteness of beneficiaries. The individuals who attend the services of any particular church are not limited to its members, but are an indefinite and varying number of persons benefited by having their minds and hearts brought under the influence of religion.[19] A gift of money to a church ''to be used at the discretion of the vestry'' has, therefore, been held to create a charity.[20]

§ 239. **Religious Purpose. Description.** What is a religious purpose within the meaning of this chapter is not easily determined. There are in this country not only a multitude of Christian denominations, but also beliefs such as the Jewish and Mohammedan which are clearly beyond the pale of the Christian church. There can be no question but that the maintenance of religious services in accordance with the views of any Christian denomination in America is a public charitable purpose.[21] The English view of this matter is immaterial. ''There are few worshiping congregations, of any pretensions to antiquity, who have not derived a part of their property from testamentary donations, that would have failed on the principles of the **English** common

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[16] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 180, 181, 26 Am. Dec. 446.

[17] 1921, Dupont v. Pelletier, 120 Me. 114, 113 Atl. 11, 13.

[18] 1834, Gass v. Wilhite, supra.

[19] 1913, People v. Braucher, 258 Ill. 604, 608, 101 N. E. 944, 47 L. R. A. 1015; 1894, McAllister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; 1907, Sears v. Attorney General, 193 Mass. 551, 555, 79 N. E. 772. But see 1875, Old South Society v. Crocker, 119 Mass. 1, 24, 20 Am. Rep. 299.

[20] 1923, Todd v. St. Mary's Church, —— R. I. ——, 120 Atl. 577.

[21] 1898, Mack's Appeal, 71 Conn. 122, 135, 41 Atl. 242. For an extended discussion see 1919, In re Hamilton, 181 Cal. 758, 186 Pac. 587, 588.

law."[22] Such large denominations as the Roman Catholic,[23] the Presbyterian,[24] the Baptist,[1] the Methodist,[2] the Episcopal,[3] and the Christian[4] churches, and the society of Quakers,[5] have thus been recognized. The same is true of smaller bodies such as communistic societies,[6] the cause of "fire baptized holiness work,"[7] a "Christ Doctrine Revealed and Astronomical Science Association,"[8] Mormonism,[9] Christian Science,[10] and the Salvation Army.[11] The latter has been designated as a unique, picturesque, and successful departure from older methods of dealing with the depressed, debased and criminal elements of society, and as an important and efficient agent of uplift and betterment.[12] A devise for the promotion and extension of Christian Science will not be held void because that religion includes a system of faith-cure for disease and is in a measure a business carried on for profit.[13] While the question of the charitable nature of

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[22] 1827, Witman v. Lex, 17 S. and R. 88, 91 (Pa.).

[23] 1888, Seda v. Huble, 75 Iowa 429, 39 N. W. 685, 9 Am. St. Rep. 495; 1897, Teele v. Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401.

[24] 1884, Andrews v. Andrews, 110 Ill. 223, 231; 1913, Succession of Villa, 132 La. 714, 722, 61 So. 765; 1853, Williams v. First Presbyterian Society, 1 Ohio St. 478, 500.

[1] 1911, Tate v. Woodyard, 145 Ky. 613, 615, 140 S. W. 1044; 1905, Wood v. Fourth Baptist Church, 26 R. I. 594, 61 Atl. 279.

[2] 1893, Hadden v. Dandy, 51 N. J. Eq. (6 Dick.) 154, 161, 26 Atl. 464 (affirmed 51 N. J. Eq. (6 Dick.) 330, 30 Atl. 429); 1923, In re Graham's Estate, —— Cal. ——, 218 Pac. 84.

[3] 1910, Brice v. All Saints Memorial Chapel, 31 R. I. 183, 194, 76 Atl. 774.

[4] 1899, Crawford v. Thomas, 114 Ky. 484, 54 S. W. 197, 55 S. W. 12, 21 Ky. Law. Rep. 1100, 1178; 1874, Miller v. Teachout, 24 Ohio St. 525.

[5] 1892, Kelly v. Nichols, 18 R. I. 62, 71, 25 Atl. 840, 19 L. R. A. 413.

[6] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 26 Am. Dec. 446.

[7] 1904, Leak v. Leak, 25 Ky. Law. Rep. 1703, 78 S. W. 471.

[8] 1913, In re Budd, 166 Cal. 286, 291, 135 Pac. 1131.

[9] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 348, 31 Pac. 436 (Reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44); 1898, Staines v. Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788; 1912, Richtman v. Watson, 150 Wis. 385, 398, 136 N. W. 797.

[10] 1912, Chase v. Dickey, 212 Mass. 555, 566, 99 N. E. 410; 1912, Glover v. Baker, 76 N. H. 393, 420, 425, 83 Atl. 916.

[11] 1910, In re Crawford, 148 Iowa 60, 126 N. W. 774, 23 Ann. Cas. 992; 1897, Lane v. Eaton, 69 Minn. 141, 143, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; 1912, Basabo v. Salvation Army, 35 R. I. 22, 23, 85 Atl. 120, 42 L. R. A. (N. S.) 1109; 1910, San Antonio v. Salvation Army, 127 S. W. 860, 862 (Tex. Civ. App.).

[12] 1909, Salvation Army in United States v. American Salvation Army, 120 N. Y. Supp. 471, 473, 135 App. Div. 268 (appeal withdrawn 200 N. Y. 555, 93 N. E. 1131).

[13] 1912, Glover v. Baker, 76 N. H. 393, 83 Atl. 916.

Jewish synagogues and Mohammedan mosques has not come up for consideration, it will not admit of any doubt that the "Catholic or Protestant, the Jew or Mohammedan may here associate for the purpose of enjoying their particular religious tenets, build churches, monasteries, synagogues or mosques, and are equally entitled to the protection of the law."[14] Such protection has accordingly been accorded to a Chinese joss house.[15] However, a legacy to the sisters of a certain church may not create a charitable trust.[16] Even a gift to a trustee for a religious community is not necessarily a charity.[17]

§ 240. **Denominational Moulds.** It is a fact, though a matter of regret to many, that religious life here, as well as elsewhere, runs largely in denominational moulds. A man ordinarily thinks of himself in the terms of the particular denomination with which he is affiliated rather than in terms of greater generalization. While it has been held that a gift to aid all the religious societies of a certain city creates a valid charity,[18] and that since all churches have at bottom the same purpose—the cure of souls—the transfer of church property from one denomination to another is not an abandonment of a charitable use,[19] while, where property by a charitable foundation is devoted to the holding and teaching of prescribed opinions, which in the course of time have completely passed away as a living force, a premium is placed on possession without belief and a corrupting instead of a beneficent instrument is created, the great weight of authority points in the opposite direction. The reason is to be found in the extreme difficulty experienced in attempting to uphold charities to religious uses which cover more than one denomination. Such gifts are very, very vague. There are many kinds of religions, and religious people are generally very particular about the kind. What is religion to one is superstition to another.[20] If all the various religions are included, the testator's intention is impossible of execution,

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[14] 1835, Burr v. Smith, 7 Vt. 241, 283, 29 Am. Dec. 154.

[15] 1916, Su Lee v. Peck, 40 Nev. 20, 160 Pac. 18.

[16] 1900, Kerrigan v. Connelly, 46 Atl. 227, 229 (N. J.).

[17] 1877, Kain v. Gibbony, 101 U. S. 362, 365, 25 L. Ed. 813.

[18] 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434.

[19] 1912, Strother v. Barrow, 246 Mo. 241, 252, 151 S. W. 960.

[20] 1907, Hadley v. Forsee, 203 Mo. 418, 428, 101 S. W. 59.

and if only a few are covered, it is unascertainable.[1] A religious charity like other charities must be to some definite purpose.[2] A gift "in which no part of the Christian world has any property legal or equitable, which no one has a right to manage or preserve, and in which the court would, perhaps, be daily called upon to regulate the uses of the buildings, which the various sects would endeavor to concentrate, each one in itself,"[3] is not sufficiently specific to be enforced. A direction to invest the gift "in building convenient places of worship, free for the use of all Christians who acknowledge the divinity of Christ, and the necessity of a spiritual regeneration" is, therefore, void.[4]

§ 241. **Denominational Moulds continued.** Since gifts to be valid must be made to some particular denominational use, the fact that they are so made is no objection to them. In fact, such gifts have almost universally been made "with a particular view to some associated body of Christians."[5] The fact that all religions are tolerated in this country certainly does not invalidate a gift[6] made to support the ministry of a particular denomination.[7] Where, therefore, a building has been built as a Presbyterian church, the trust is breached by a transfer of it to a Methodist congregation.[8] A Lutheran school built by the contributions of Lutherans and others cannot, over the protest of the Lutherans, be taken over by the latter.[9]

§ 242. **Denominational Moulds. Evidence.** It is unlikely that a person will give property to any other church than his own. A denominational purpose may, therefore, be implied from the denominational connections of the donor.[10] While evidence of the religious opinions of the founder is inadmissible to vary the terms of the written declaration of trust,[11] courts will not "interfere with the application which

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1 1881, Simpson v. Welcome, 72 Me. 496, 499, 39 Am. Rep. 349.

2 1845, Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94.

3 1845, White v. Attorney General, 39 N. C. (4 Ired. Eq.) 19, 21, 44 Am. Dec. 92.

4 1845, White v. Attorney General, supra.

5 1820, Baker v. Fales, 16 Mass. 488, 506.

6 1881, In re Hinkley, 58 Cal. 457, 512.

7 1902, Eliot's Appeal, 74 Conn. 586, 604, 51 Atl. 558.

8 1857, Ludham v. Higbee, 11 N. J. Eq. (3 Stockt.) 342.

9 1884, Busby v. Mitchell, 23 S. C. 472.

10 1875, Schmidt v. Hess, 60 Mo. 591.

11 1859, Attorney General v. Dublin, 38 N. H. 459, 562.

a trustee has made of a fund given to a religious use upon the ground that the donor intended to limit the application of the fund to the support of different theological opinions, unless the intention to exclude the opinions to the support of which the fund has been applied, has been plainly expressed by the donor."[12]

§ 243. **Extension of Statute of Elizabeth.** It has been seen that the only charity of a religious character mentioned in the statute of Elizabeth is the "repair of churches." It follows irrefutably that "a gift for the repair of a church, in the modern sense of that word, as a place for public worship, open to everybody and established for the promotion of religion and morality among all people, whether regularly connected with its ecclesiastical organization or not, is a charity.[13] Such charities, however, are not limited to the repair of existing churches, but extend to the erection of new places of worship, which purpose is within the spirit of the statute.[14] The support and propagation of religion, including as it does gifts for the erection, maintenance and repair of church edifices, are, therefore, charitable purposes.[15] As a practical proposition, the repair of old churches and the erection of new churches are not kept apart in the minds of the donors, and are indiscriminately treated by the courts as valid charities.[16] The same holds good in regard to ministers' homes or parsonages,[17] but is not confined to them.

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[12] 1857, Attorney General v. Dublin, 38 N. H. 459, 510.

[13] 1912, Chase v. Dickey, 212 Mass. 555, 566, 99 N. E. 410. See 1923, In re Graham's Estate, —— Cal. ——, 218 Pac. 84.

[14] 1884, Andrews v. Andrews, 110 Ill. 223, 230.

[15] 1882, Beckwith v. St. Philips Parish, 69 Ga. 564, 569; 1838, Reformed Protestant Dutch Church in Garden St. v. Mott, 7 Paige 77, 32 Am. Dec. 613 (N. Y.).

[16] 1898, Mack's Appeal, 71 Conn. 122, 135, 41 Atl. 242; 1856, Johnson v. Mayne, 4 Iowa (4 Clark) 180, 194, 195; 1876, Nason v. First Bangor Christian Church, 66 Me. 100; 1895, In re Bartlett, 163 Mass. 509, 514, 40 N. E. 899; 1875, Old South Society v. Crocker, 119 Mass. 1, 22, 20 Am. Rep. 299; 1914, Sandusky v. Sandusky, 261 Mo. 351, 358, 168 S. W. 1150; 1893, St. George's Church Society v. Branch, 120 Mo. 226, 238, 25 S. W. 218; 1857, Chapin v. School District, 35 N. H. 445, 453; 1848, Baldwin v. Baldwin, 7 N. J. Eq. (3 Halst.) 211; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 281, 25 Pac. 720, 11 L. R. A. 210; 1862, Potter v. Thornton, 7 R. I. 252; 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 31 Pac. 436 (reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44).

[17] 1839, Sewall v. Cargill, 15 Me. (3 Shep.) 414; 1875, Old South Society v. Crocker, 119 Mass. 1, 22, 20 Am. Rep. 299; 1895, In re Bartlett, 163 Mass. 509, 517, 40 N. E. 899; 1914, Sandusky v. San-

Clergymen must be supported as well as housed. Such support is one of the greatest financial burdens borne by the various denominations. Gifts, whether they are made generally for the support of religious services,[18] or specially for the support of the ministering clergymen,[19] or for a parsonage,[20] or for the support of a course of sermons to be preached annually in a certain chapel,[1] therefore, create valid charities. So do gifts for the support of a bishop of a church with an Episcopalian form of government,[2] for the support and maintenance of the worn-out preachers of a designated denomination,[3] and for the building of a convent at a certain place.[4] Such a trust, established in 1817 to be paid to "the minister of the Congregational persuasion" regularly ordained and statedly preaching in a certain society, is not breached though the minister to whom such payment is made is a Unitarian.[5]

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dusky, 261 Mo. 351, 358, 168 S. W. 1150; 1874, Methodist Episcopal Society v. Harriman, 54 N. H. 444, 445; 1848, Baldwin v. Baldwin, 7 N. J. Eq. (3 Halst.) 211; 1891, Pennoyer v. Wadhams, 20 Ore. 274, 281, 25 Pac. 720, 11 L. R. A. 210.

[18] 1884, Coit v. Comstock, 51 Conn. 352, 386, 50 Am. Rep. 29; 1914, M. E. Church of Milford v. Williams, 6 Boyce 62, 96 Atl. 795 (Del. Super.); 1904, Osgood v. Rogers, 186 Mass. 238, 71 N. E. 306; 1908, Van Syckel v. Johnson, 70 Atl. 657, 658 (N. J.); 1836, Bryant v. McCandless, 7 Ohio (7 Ham.) Part 2, 135.

[19] 1898, Mack's Appeal, 71 Conn. 122, 135, 41 Atl. 242; 1886, King v. Grant, 55 Conn. 166, 170, 10 Atl. 505; 1882, Beckwith v. St. Philips Parish, 69 Ga. 564, 569; 1895, Alden v. St. Peter's Parish, 158 Ill. 631, 638, 42 N. E. 392, 30 L. R. A. 232; 1856, Johnson v. Mayne, 4 Iowa (4 Clark) 180, 194, 195; 1822, Shapleigh v. Pilsbury, 1 Me. (1 Greenl.) 271; 1869, Swasey v. American Bible Society, 57 Me. 523, 525; 1886, Merritt v. Bucknam, 78 Me. 504, 508, 7 Atl. 383; 1813, Brown v. Porter, 10 Mass. 93, 96; 1827, Thompson v. Congregational Society, 22 Mass. (5 Pick.) 469, 477; 1857, Wells v. Heath, 76 Mass. (10 Gray) 17; 1895, In re Bartlett, 163 Mass. 509, 517, 40 N. E. 899; 1902, Farmers and Merchants' Bank v. Robinson, 96 Mo. App. 385, 392, 70 S. W. 372; 1857, Chapin v. School District, 35 N. H. 445, 453; 1875, Orford Union Congregational Society v. West Congregational Society, 55 N. H. 463; 1877, Cory Universalist Society v. Beatty, 28 N. J. Eq. (1 Stew.) 570 (affirmed 31 N. J. Eq. 796); 1849, Tucker v. St. Clement's Church, 5 N. Y. Super Ct. (3 Sandf.) 242 (Affirmed 8 N. Y. 558, Seld. Notes 191); 1855, Thompson v. Swoope, 24 Pa. (12 Harris) 474, 481.

[20] 1917, Howard v. Howard, 227 Mass. 395, 116 N. E. 937.

[1] 1864, Attorney General v. Trinity Church, 91 Mass. (9 Allen) 422, 439.

[2] 1829, Bishop's Fund v. Eagle Bank, 7 Conn. 476, 478.

[3] 1900, Hood v. Dorer, 107 Wis. 149, 153, 82 N. W. 546.

[4] 1881, Hughes v. Daly, 49 Conn. 34. But see 1878, Delaware County v. Sisters of St. Francis, 2 Del. County Rep. 149 (Pa.).

[5] 1859, Attorney General v. Dublin, 38 N. H. 459.

§ 244. **Parochial and Sunday Schools.** Church purposes are not merely religious in the strict sense of the word, but also educational. If a church is not to pass out of existence, it must educate its younger generation so that when the older generation has passed away there will be a body of men and women to take its place. This purpose has been accomplished in this country through parochial and Sunday schools, which in consequence are both recognized as charities. Despite the prejudice which exists in certain quarters, a parochial school will be considered as germane to the purposes of a church corporation.[6] Such a school has been held to be clearly within the statute of Elizabeth[7] and to be an unquestionable charity.[8] It follows that such an institution, whether it is a day school[9] or a Sunday school,[10] is an institution combining religious with educational features to which a charitable gift may well be made. Such gifts may be limited to the promotion and advancement of the educational interests of a certain designated church,[11] to its Sabbath school library,[12] to the purchase of Sunday school books,[13] and to the purpose of rewarding pupils of the school for special merit.[14] Where, however, the purpose is merely to make Christmas presents to its pupils, the gift will not be treated as charitable.[15]

§ 245. **Education for the Ministry.** While there are some small denominations which manage without a trained ministry, it is generally admitted, in this day of specialization, that a clergy educated for its particular task is desirable,

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[6] 1894, Hanson v. Little Sisters of the Poor, 79 Md. 434, 438, 32 Atl. 1052, 32 L. R. A. 293.

[7] 1884, Andrews v. Andrews, 110 Ill. 223, 231.

[8] 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. J. Eq. 36, 53).

[9] 1912, Ackerman v. Fichter, 179 Ind. 392, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117; 1845, Newcomb v. St. Peter's Church, 2 Sandf. Ch. 636 (N. Y.); 1899, Keith v. Scales, 124 N. C. 497, 517, 32 S. E. 809; 1906, Banner v. Rolf, 43 Tex. Civ. App. 88, 93, 94 S. W. 1125.

[10] 1893, Conklin v. Davis, 63 Conn. 377, 384, 28 Atl. 537; 1887, Morville v. Fowle, 144 Mass. 109, 10 N. E. 766; 1895, In re Bartlett, 163 Mass. 509, 514, 40 N. E. 899; 1876, Mason v. Tuckerton M. E. Church, 27 N. J. Eq. (12 C. E. Green) 47, 50.

[11] 1884, Andrews v. Andrews, 110 Ill. 223, 232.

[12] 1868, Fairbanks v. Lamson, 99 Mass. 533.

[13] 1895, In re Bartlett, 163 Mass. 509, 517, 40 N. E. 899.

[14] 1902, Coleman v. O'Leary, 114 Ky. 388, 403, 24 Ky. Law. Rep. 1248, 70 S. W. 1068.

[15] 1878, Goodell v. Union Ass'n of Children's Home, 29 N. J. Eq. (2 Stew.) 32, 35.

if not essential. The response to such a need from the well-to-do, however, is insufficient to meet the needs of the situation. In consequence, it becomes necessary to educate young men of little or no means for this purpose. If the financial difficulties in the way are to be overcome, charity must intervene to enable such young men to finish the prescribed course and prepare themselves for their mission. This, accordingly, is being done in probably all denominations of any consequence. There can be no question but that such assistance constitutes a valid charity whether it is viewed from its religious or educational side. It has accordingly been upheld by the courts where it had taken the form of a donation in trust.[16]

§ 246. **Missions.** Religious purposes are not confined within the narrow boundaries of individual congregations or within the wider limits of conferences, synods, dioceses, yearly meetings and other similar church bodies. They literally encircle the globe. The words of Christ, "Go ye, therefore, and teach all nations,"[17] are as imperative to-day as they were in the days of the apostles. Missions are, therefore, recognized as charities for the purpose of civilizing, Christianizing and educating the less fortunate inhabitants of this and foreign countries,[18] and are indisputably within the realm of public charities.[19] "The propagation of the Christian religion, whether among our own citizens or the people of any other nation, is an object of the highest concern, and cannot be opposed to any general rule of law, or principle of public policy."[20] Since the courts will aid and enforce a gift to maintain a single church building, they will also enforce a gift for the further extension of the influence of

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[16] 1905, Woodruff v. Hundley, 147 Ala. 287, 39 So. 907; 1913, In re Goodfellow, 166 Cal. 409, 137 Pac. 12; 1887, Storrs Agricultural School v. Whitney, 54 Conn. 342, 352, 8 Atl. 141; 1846, McCord v. Ochiltree, 8 Blackf. 15, 24 (Ind.); 1907, Washburn College v. O'Hara, 75 Kans. 700, 90 Pac. 234; 1912, In re Miller, 133 N. Y. Supp. 828, 831, 149 App. Div. 113; 1827, Witman v. Lex, 17 Serg. and R. 88, 17 Am. Dec. 644 (Pa.); 1901, Young v. St. Mark's Lutheran Church, 200 Pa. 332, 335, 49 Atl. 887; 1880, Daniel v. Fain, 73 Tenn. (5 Lea.) 319, 324; 1890, Field v. Drew Theological Seminary, 41 Fed. 371, 374; 1893, Barnard v. Adams, 58 Fed. 313, 317.

[17] Matthew 28, verse 19.

[18] 1913, Hitchcock v. Board of Home Missions, 259 Ill. 288, 296, 102 N. E. 741, Ann. Cas. 1915 B. 1 (Reversing 175 Ill. App. 87).

[19] 1921, Prime v. Harmon, 120 Me. 299, 113 Atl. 738.

[20] 1815, Bartlett v. King, 12 Mass. 536, 540, 7 Am. Dec. 99.

the Christian religion among the human race in this and foreign countries.[21] "There is no quarter of the globe, at home or abroad, which has not been penetrated by mission workers sent by Christian churches to propagate the gospel and ameliorate human suffering. These emissaries form a body of workers which reaches an indefinite public. A gift to them or to support their efforts is, also, in the strictest sense, within the definition of a public charity."[22] Erection of chapels in various parts of the world is, therefore, recognized as a religious charitable purpose.[23] A gift to the Society of Soul Winners, a corporation organized to help the mountain people by sending to them preachers and teachers and to assist them in building churches and schoolhouses, is valid, the corporate purposes sufficiently describing the purposes of the gift.[1]

§ 247. **Mission Instruments.** The instruments through which this work is carried on are many and varied. There are missionary societies large and small, boards of missions, church extension funds, Bible and tract societies, and the like. All these bodies are merely means to an end and are charitable in their very nature.[2] Gifts to the board of missions,[3] or to the missionary committee[4] of a certain church, to its home and foreign missions,[5] to its missionary[6] or church extension[7] society, to its church extension fund[8] or missionary

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[21] 1902, Bruere v. Cook, 63 N. J. Eq. 624, 627, 52 Atl. 1001.

[22] 1916, Cummings v. Dent, 189 S. W. 1161 (Mo.).

[23] 1923, In re Atkinson's Will, 197 N. Y. Supp. 831.

[1] 1923, Goldberg v. Home Missions, 197 Ky. 724, 248 S. W. 219.

[2] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 617; 1875, Maine Baptist Missionary Convention v. Portland, 65 Me. 92; 1889, Trustees v. Guthrie, 86 Va. 125, 132, 10 S. E. 318, 6 L. R. A. 321.

[3] 1858, Lewis v. Lusk, 35 Miss. 401, 421; 1902, Bruere v. Cook, 63 N. J. Eq. 624, 629, 52 Atl. 1001; 1818, Gould v. Board of Home Missions, 102 Neb. 526, 167 N. W. 776.

[4] 1892, Frazier v. St. Luke's Church, 147 Pa. 256, 261, 23 Atl. 442.

[5] 1913, Hitchcock v. Board of Home Missions, 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915 B. 1 (Reversing 175 Ill. App. 87); 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 369.

[6] 1894, McAllister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; 1868, Fairbanks v. Lamson, 99 Mass. 533; 1877, Straw v. East Maine Conference of M. E. Church, 67 Me. 493.

[7] 1910, Sprowl v. Blankenbaker, 127 S. W. 496 (Ky.).

[8] 1915, Rust v. Evenson, 161 Wis. 627, 155 N. W. 145; 1912, Greer v. Synod Southern Presbyterian Church, 150 Ky. 155, 150 S. W. 16.

cause,[9] to its African[10] or Japanese[11] mission, or for the purpose of more effectually promoting and extending the religion of Christian science,[12] or for fitting out missionary boxes,[13] have, therefore, been upheld as religious charities.

§ 248. **Mission Schools and Houses, Bible and Tract Societies.** Such gifts, however, need not be general, but may be confined to some of the many needs of these missionary enterprises. Schools, both elementary and advanced, are among the most potent instruments at the command of missionaries. Elementary schools bring the gospel direct to the subjects of the mission and prepare the future native teachers and preachers for more advanced courses. Gifts confined to such an educational purpose are, therefore, charitable without a question.[14] The same holds good in regard to homes created to care for returned, needy and worthy missionaries worn out by their labors and unfavorable climatic conditions. Unless some such provision were made, the difficulty of obtaining missionaries might be increased to a prohibitive degree.[15] Nor should the importance of Bible and tract societies be overlooked. They are of the utmost importance in the prosecution of all missionary work, furnish the very foundation for it, and are, therefore, properly classed as charitable.[16]

§ 249. **Home Missions.** Opportunities for missionary work are very close at hand. Every city of any size furnishes a great field for it. "No city is so crowded with houses of worship that in the opinion of the adherents of some sect or denomination there is not a call for more."[17] A gift to the

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[9] 1880, Missionary Society of M. E. Church v. Chapman, 128 Mass. 265.

[10] 1858, Appeal of Domestic and Foreign Missionary Society, 30 Pa. (6 Casey) 425, 433.

[11] 1904, Cook v. Universalist General Convention, 138 Mich. 157, 101 N. W. 217.

[12] 1912, Glover v. Baker, 76 N. H. 393, 402, 83 Atl. 916.

[13] 1922, Brinsmade v. Beach, 98 Conn. 322, 119 Atl. 233.

[14] 1888, Dascomb v. Marston, 80 Me. 223, 232, 13 Atl. 888; 1910, Boardman v. Hitchcock, 120 N. Y. Supp. 1039, 136 App. Div. 253 (affirmed 202 N. Y. 622, 96 N. E. 1110).

[15] 1910, Boardman v. Hitchcock, supra; 1908, In re Peabody, 154 Cal. 173, 97 Pac. 184.

[16] 1848, Beall v. Fox, 4 Ga. 404, 427; 1909, Kasey v. Fidelity Trust Co., 131 Ky. 609, 621, 115 S. W. 739; 1881, Simpson v. Welcome, 72 Me. 496, 39 Am. Rep. 349; 1891, Kelly v. Nichols, 17 R. I. 306, 322, 21 Atl. 906, 19 L. R. A. 413; 1872, Frierson v. General Assembly Presbyterian Church, 54 Tenn. (7 Heisk) 683, 696.

[17] 1902, Eliot's Appeal, 74 Conn. 586, 603, 51 Atl. 558.

mission of a certain church,[18] or for a mission chapel,[19] or for the support of a city missionary,[20] are, therefore, valid charitable gifts. "No uses can be more distinctly religious than the establishment of a mission church."[21] A church, therefore, has the power to devote its unappropriated resources to the aid of other domestic and foreign churches, missions or other religious purposes.[1]

§ 250. **Superstitious Uses.** The doctrine of superstitious uses evolved in England during the time of the reformation[2] and aimed particularly against Catholics, though applicable also to Jews and dissenters, rests on the fact that there was a state religion recognized and established, whose purposes were deemed to be pious, while the purposes of all other religions were considered as superstitious. This distinction has been applied with such stringency that a gift for the propagation of the doctrines of the Church of England in **Scotland** has been treated by an **English** chancellor as superstitious because the **Presbyterian** church was, by act of Parliament, established in Scotland.[3] It was this distinction and the persecutions incident to it which forced the pilgrim fathers to come to America. "That religious intolerance which infused itself through parliamentary enactments and judicial sentences, and which procured the law to anathematize differing creeds as 'superstition' or 'heresy' accordingly as Catholic or Protestant gained governmental ascendancy, was, more than anything else, what our ancestors fled from."[4] In consequence, the doctrine of superstitious uses has never had any foothold on this side of the Atlantic. "The disabilities of the English law upon the rights of conscience and freedom of worship, though imposed in many instances, did not become established as a part of our legal policy. The

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[18] 1915, Rust v. Evenson, 161 Wis. 627, 155 N. W. 145; 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. J. Eq. 36, 53).

[19] 1874, Attorney General v. Union Society of Worcester, 116 Mass. 167.

[20] 1847, Sohier v. St. Paul's Church, 53 Mass. (12 Net.) 250.

[21] 1902, Eliot's Appeal, 74 Conn. 586, 603, 51 Atl. 558.

[1] 1912, Chase v. Dickey, 212 Mass. 555, 562, 99 N. E. 410.

[2] This doctrine had its inception in the statute of 23 Henry the Eighth, Chapter 10. See 2 Am. Dec. in Eq. 21. See Section 20, **supra.**

[3] 1692, Attorney General v. Guise, 2 Vern. 266.

[4] 1898, Harrison v. Brophy, 59 Kans. 1, 5, 51 Pac. 883, 40 L. R. A. 721.

fierce struggle between ancient bigotry and growing liberality, though renewed and continued here, was not a struggle between an established order and a revolutionary and protesting force. It was a struggle to prevent, and not to uproot, a legally authorized ecclesiastical system."[5]

§ 251. **Superstitious Uses inconsistent with our Constitution.** What is thus historically true, has become doubly certain by the course which events have taken in the United States. Both the federal and state constitutions contain provisions amply guarantying religious liberty, and their spirit has been breathed into the state and federal statutes and is reflected in the judgments and opinions handed down by the various American courts. It has thus become the settled policy of all American legislation to allow all denominations "an equal right to exercise 'religious profession and worship,' and to support and maintain its ministers, teachers and institutions, in accordance with its own practice, rules and discipline."[6] No discrimination can legally be made between different forms of worship.[7] Courts as such have nothing to do with creeds or their orthodoxy. All denominations stand before them on the same footing and must be treated alike.[8] Superstitious uses, being opposed to the spirit of our institutions,[9] to "the spirit of religious toleration which has always prevailed in this country,"[10] are, therefore, not possible in America,[11] and can never gain a foothold so long as the courts cannot decide that any particular religion is **the** true religion.[12] An attempt to make a distinction between pious and superstitious uses would be productive of

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[5] 1898, Harrison v. Brophy, 59 Kans. 1, 6, 51 Pac. 883, 40 L. R. A. 721.

[6] 1896, Christ Church v. Trustees of Donations and Bequests, 67 Conn. 554, 565, 35 Atl. 552.

[7] 1898, Hoeffer v. Clogan, 171 Ill. 462, 469, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

[8] 1902, Coleman v. O'Leary, 114 Ky. 388, 401, 402, 24 Ky. Law. Rep. 1248, 70 S. W. 1068.

[9] 1883, In re Hagenmeyer, 12 Abb. N. C. 432, 2 Dem. Sur. 87, 90 (N. Y.); 1886, Appeal of Seibert, 3 Sad. 412, 6 Atl. 105 (Pa.).

[10] 1898, Harrison v. Brophy, 59 Kans. 1, 5, 51 Pac. 883, 40 L. R. A. 721.

[11] 1832, Methodist Church v. Remmington, 1 Watts 219, 225, 26 Am. Dec. 61 (Pa.); 1910, In re Kavanaugh, 143 Wis. 90, 96, 126 N. W. 672.

[12] 1850, Andrew v. New York Bible and Prayer Book Society, 6 N. Y. Super. Ct. (4 Sandf.) 156, 181 (Reversed 8 N. Y. (4 Seld.) 559; Seld. Notes 192); 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 108, 1 Rich. Law. 176 Note (S. C.).

a strange anomaly.[13] "Under a constitution which extends the same protection to every religion and to every form and sect of religion, which establishes none and gives no preference to any, there is no possible standard by which the validity of a use as pious can be determined; there are no possible means by which judges can be enabled to discriminate, between such uses as tend to promote the best interests of society by spreading the knowledge and inculcating the practice of true religion, and those which can have no other effect than to foster the growth of pernicious errors, to give a dangerous permanence to the reveries of a wild fanaticism, or encourage and perpetuate the observances of a corrupt and degrading superstition."[14] The recognition which religion has obtained from common consent and legislative enactments as a valuable part of the institutions of America, must prevent the courts from saying that any religious use is superstitious. It is neither for the legislature or the judiciary to say what is a pious and what a superstitious use. To do so would be flying in the very face of the great American doctrine of religious liberty.[15]

§ 252. **Superstitious Uses. Conclusion.** The entire distinction between pious and superstitious uses has thus completely broken down in America. The consequence is that the ground over which religious trusts spread has been very much extended, embracing every creed of religion and every institution calculated to promote it.[16] No religion is either established or merely tolerated, but all are protected. Hence, the Protestant may devote his property to the spreading of the Bible, the Catholic to the endowment of monasteries, the Chinaman to the building of a joss house, the Jew to the publication of the Talmud, and the Mohammedan to the relief of pilgrims to Mecca.[17] No fear is felt that superstition will envelop and destroy the nation. Even if it were entertained, it is recognized that statutes cannot successfully cope with the situation. An established religion,

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[13] 1850, Andrew v. New York Bible and Prayer Book Society, supra.

[14] 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 188.

[15] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 176, 26 Am. Dec. 446.

[16] 1844, Green v. Allen, 24 Tenn. (5 Humph.) 170, 207.

[17] 1849, Ayers v. M. E. Church, 5 N. Y. Super. Ct. (3 Sandf.) 351, 377, 8 N. Y. Leg. Obs. 17.

outside of those born into its mould, can result only in producing either martyrs or hypocrites. It is not the policy of the state to produce either. Reliance is, therefore, placed on public opinion rather than on statutes or constitutional provisions as a "protection against superstition."[18]

§ 253. **Masses.** It remains to illustrate what has just been said by a prominent example. Subsequent to the reformation, and prior to the toleration statutes, trusts for masses were relentlessly hunted down in England as superstitious uses. By parity of reasoning they have been upheld in America, and if declared void, the decision has been put on different grounds. It is a general principle of American law that gifts for the observance of any ceremonial, the efficiency of which is recognized by the donor's church, will not be regarded as superstitious.[19] The validity of a gift to masses certainly is "to be tested by the same principles that would be applied to a devise in aid of the religious observances of any other denomination."[1]

§ 254. **Masses. Definition.** Before this test can be applied intelligently, it is necessary to clearly understand the meaning of the word "mass." A mass has been said to be an act of public worship in celebration of the Eucharist,[2] a religious ceremonial or observance,[3] a public and external form of worship constituting a visible action,[4] a use not merely for the benefit of disembodied spirits, but also for the benefit of the living members of the church,[5] a public service by which, according to the Catholic belief, the priest who celebrates it helps the living and obtains rest for the dead,[6] a ceremonial celebrated in open church where all who choose may be present and participate, a solemn and im-

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[18] 1835, Burr v. Smith, 7 Vt. 241, 282, 29 Am. Dec. 154.

[19] 1907, In re Lennon, 152 Cal. 327, 330, 92 Pac. 870, 125 Am. St. Rep. 58; 1883, In re Hagenmeyer, 12 Abb. N. C. 432, 2 Dem. Sur. 87 (N. Y.).

[1] 1902, Coleman v. O'Leary, 114 Ky. 388, 402, 24 Ky. Law. Rep. 1248, 70 S. W. 1068.

[2] 1912, Ackerman v. Fichter, 179 Ind. 392, 402, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117.

[3] 1919, Matter of Morris, 227 N. Y. 141, 124 N. E. 724.

[4] 1898, Hoeffer v. Clogan, 171 Ill. 462, 469, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

[5] 1912, Ackerman v. Fichter, 179 Ind. 392, 403, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117; 1798, Browers v. Fromm, Add. 362, 371 (Pa.). See 1829, McGirr v. Aaron, 1 Pen. and W. 49, 21 Am. Dec. 361 (Pa.).

[6] 1902, Coleman v. O'Leary, supra.

pressive ritual, religious in its form and teaching, from which many draw spiritual solace, guidance and instruction,[7] a means of providing for the support of the clergy,[8] and of the church generally,[9] a religious use which can be contracted for by a living person.[10]

§ 255. **Masses. Conclusion.** The religious doctrine on which this ceremonial is founded clearly does not conflict with, or impair the rights and obligations of the state.[11] Hence, the right to devote property to its support is as sacred as conscience itself.[12] Those who believe in the efficacy of prayer for the dead are entitled to the same respect and protection in their religious observances as those of any other denomination.[13] The fact that certain acts are believed to be vicariously helpful to souls in purgatory, does not alter or transform their actual character or nature, or deprive them of their essential qualities of unselfishness and unpaid kindness and assistance to the poor and needy.[14] Gifts for masses have, therefore, been upheld as religious observances,[15] whether they were made in terms to a priest,[16] to a hospital,[17] to a college,[18] to an incorporated church,[19] or to any other trustee, or without naming any trustee,[20] and though the donor intended to obtain some special benefit for himself.[1]

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[7] 1898, Webster v. Sughrow, 69 N. H. 380, 383, 45 Atl. 139, 48 L. R. A. 100.

[8] 1898, Hoeffer v. Clogan, **supra.**

[9] 1912, Ackerman v. Fichter, **supra.**

[10] 1885, Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41.

[11] 1898, Kerrigan v. Tabb, 39 Atl. 701, 703 (N. J.).

[12] 1912, Ackerman v. Fichter, 179 Ind. 392, 404, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117. For the leading English case see Bourne v. Keane L. R. 1919 App. Cas. 815.

[13] 1888, Holland v. Alcock, 108 N. Y. 312, 329, 16 N. E. 305, 2 Am. St. Rep. 420, 20 Abb. N. C. 447.

[14] 1916, Society of Helpers of Holy Souls v. Law, 267 Mo. 667, 186 S. W. 718, 726.

[15] 1913, Burke v. Burke, 259 Ill. 262, 270, 102 N. E. 293; 1912, Ackerman v. Fichter, **supra;** 1883, **Ex parte** Schouler, 134 Mass. 426; 1883, **In re** Hagenmeyer, 12 Abb. N. C. 432, 2 Dem. Sur. 87 (N. Y.); 1909, **In re** Eppig, 118 N. Y. Supp. 683, 63 Misc. Rep. 613; 1894, **In re** Backes, 30 N. Y. Supp. 394, 9 Misc. Rep. 504, 1 Gibbons 135, 61 N. Y. St. Rep. 739; 1888, Holland v. Alcock, **supra;** 1886, Seibert's Appeal, 3 Sad. 412, 6 Atl. 105 (Pa.); 1880, Rhymer's Appeal, 93 Pa. 142, 146, 39 Am. Rep. 736.

[16] 1908, Gilmore v. Lee, 237 Ill. 402, 414, 86 N. E. 568, 127 Am. St. Rep. 330; 1898, Kerrigan v. Tabb, 39 Atl. 701, 703 (N. J.); 1923, Slattery v. Ward, —— R. I. ——, 119 Atl. 755.

[17] 1907, Johnson v. Hughes, 187 N. Y. 446, 80 N. E. 373.

[18] 1900, Kerrigan v. Connelly, 46 Atl. 227, 229 (N. J.).

[19] 1918, Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490.

[20] 1919, Wilmes v. Tierney, 187 Iowa 390, 174 N. W. 271.

[1] 1898, Hoeffer v. Clogan, 171 Ill. 462, 469, 49 N. E. 527, 40 L. R. A. 730, 63 Am. Rep. 241.

§ 256. **Masses. Exceptional States.** It is a deplorable fact that the states of Virginia, West Virginia, Maryland, New York, Michigan, Wisconsin, Minnesota and Mississippi have strayed or broken away from the English charity doctrine and that only New York, Michigan and Wisconsin have substantially returned to it.[2] It has, therefore, been held in Minnesota[3] and in Wisconsin, before that state had reëstablished the English charity doctrine,[4] that gifts for masses are void on account of the indefiniteness of their beneficiaries. It is instructive to note that the Wisconsin case was overruled after the Badger state had returned to the English charity doctrine.[5] A similar development has taken place in New York.[6] In states, however, which still adhere to their peculiar doctrine, trusts for masses are cast down on the ground above stated. It has also been held in Missouri that a bequest for masses is for the financial benefit of the priest who says them, and is void under a constitutional provision which forbids any bequest to "any minister."[7]

§ 257. **Masses. Extraordinary Decisions.** It must not be supposed that gifts for masses have uniformly been held to be void in the states mentioned in the preceding paragraph. The abolition of the English charity doctrine has not curbed the desire of the courts to uphold such gifts. Such a gift has been upheld in an earlier New York case as an adjunct or concomitant of burial. Says the court: "One testator may direct his whole estate expended in the pomp of a funeral pageant, a second in a monument to commemorate his name, a third in religious services for the benefit of his soul. It is a matter of taste and of religious faith."[8] In the same state a gift to a priest for masses has been held not to be within the state mortmain statute.[9] In other cases such a gift has

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[2] See Chapter 2, pp. 21-44.

[3] 1903, Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948.

[4] 1897, McHugh v. McCole, 97 Wis. 166, 176, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724.

[5] 1910, In re Kavanaugh, 143 Wis. 90, 98, 126 N. W. 672.

[6] 1898, In re Zimmerman, 50 N. Y. Supp. 395, 22 Misc. Rep. 411, 2 Gibbons 357. See 1888, Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305.

[7] 1876, Schmucker v. Reel, 61 Mo. 592, 602.

[8] 1886, Holland v. Smyth, 3 How. Prac. (N. S.) 106, 109 (Affirmed 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420).

[9] 1898, In re Zimmerman, supra.

been treated as merely creating a valid private trust.[10] In a California case, the court, to save the gift from the mortmain statute, has held that it lacks perpetuity and every other element of a charitable use, is not for the benefit of the public or a part of it, and is a bequest for the benefit of the testator only.[11] In Kansas, a gift to a priest for masses has been upheld as a direct gift to the priest with advisory, persuasive, precatory words attached which merely enjoin on the donee's conscience the duty of performing the sacred services named.[12] A gift to the president of a college to be distributed equally among the clergy of said college for the purpose of having masses offered up for the repose of the soul of the donor has been upheld as a gift to the clergymen themselves.[13] A request that services be held yearly at a church contemplated to be erected on testator's farm, for his soul, has been held not to invalidate the devise of such farm.[14] A bequest to be expended in masses for the testator's soul has been construed as directing that the expenditure be made within a reasonable time.[15] Under a bequest of $1,000, to be turned over by the executor to the pastor at a certain place for masses, the court has ordered the whole sum to be turned over to such pastor.[16] Property given to the successors of a priest for masses for his soul will not be turned over to an interloper not recognized by the church.[17] Gifts to particular priests for masses are gifts to those individuals and do not create charities, while gifts to bishops for masses to be said in the churches of their diocese create charitable trusts.[18]

§ 258. **Summary.** While charities of a religious character are referred to in the statute of Elizabeth only under the words "repair of churches," they have been universally recognized both in England and America, and have been held to

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[10] 1897, Moran v. Moran, 104 Iowa 216, 225, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443; 1890, Vanderveer v. McKane, 11 N. Y. Supp. 808, 25 Abb. N. C. 105.

[11] 1907, In re Lennon, 152 Cal. 327, 330, 92 Pac. 870, 125 Am. St. Rep. 58.

[12] 1898, Harrison v. Brophy, 59 Kans. 1, 51 Pac. 883, 40 L. R. A. 721.

[13] 1840, Newton v. Carberry, Fed. Cas. No. 10,190, page 132, 5 Cranch C. C. 632.

[14] 1888, Seda v. Huble, 75 Iowa 429, 39 N. W. 685, 9 Am. St. Rep. 495.

[15] 1893, Tirney's Estate, 2 Pa. Dist. Rep. 524 (Pa.).

[16] 1886, Appeal of Seibert, 3 Sad. 412, 6 Atl. 105 (Pa.).

[17] 1798, Browers v. Fromm, Add. 362 (Pa.).

[18] 1919, In re Hamilton, 181 Cal. 758, 186 Pac. 587.

cover in addition the erection of new churches, the general support of church work, and the propagation of church faiths by educational and missionary endeavors. Their recognition as public charities, however, is attended with no little difficulties in the United States since state control of religion is forbidden by both the state and the federal constitutions, while eleemosynary and educational charities are more and more being taken over by the state, which fact is but a legitimate postulate of their public character. Despite this difficulty, gifts to all the various denominations for the purpose of aiding them in their work have been universally upheld as valid charities resulting in an abandonment of the distinction between pious and superstitious uses which was once so prevalent in England. Hence, gifts for masses are valid charities in America.

CHAPTER VI

BENEVOLENCE

§ 259. **Church Poor Relief. History.** Next to religious charities, eleemosynary donations were the earliest to be thought of. As soon as churches accumulated property, they began to relieve the poor. They acted on the principle that it is more blessed to give than to receive. They did not, however, always intelligently administer their gifts. In their zeal they frequently forgot or lost sight of the principle that he who will not work shall not be allowed to eat. It is not well to place those who will not work on a par with honest labor and allow them to understand that the spoils of dependency are as ample as the rewards of industry. In consequence of this mistaken policy, the charitable efforts of society have to some extent "been pauperizing instead of elevating men."[1]

§ 260. **Objectionable Features.** Nor is this fault confined to ecclesiastical agencies for poor relief. Among the causes which produce pauperism, the unwise liberality of the general public must be accorded at least equal rank with bad industrial conditions, injudicial official treatment, and the innate faulty character of the pauper himself. A beneficent purpose unwisely administered may spread more contagion of evil and undermine morality more deeply and lastingly than the deeds of buccaneers or the exploitations of conquerors.[2] This applies particularly to doles, which were at one time very common in England and consisted in the indiscriminate handing out to beggars of small sums of money to relieve their distress. Such gifts are reproduced in this country in another form. Many good people cannot turn away a tramp who applies for a meal. Such and similar small gifts are frequently disastrous. Doles received by a person on the borderland of pauperism sometimes merely enable him to underbid his competitors in the sweatshops. Where they

[1] See 5, Johns Hopkins University Studies 283, 319.

[2] 1910, Attorney General v. Kaskaskia Commons, 243 Ill. 239, 90 N. E. 654.

are received from various sources, particularly churches of different denominations, they almost inevitably degrade him into a liar and a hypocrite. The step from such an environment into the grim domain of pauperism is certainly very easy, and cases where it is not taken are the exception, not the rule. It has, therefore, been said that doles and overlapping, together with the careless administration of public or semi-public relief, form the down-grade to pauperism.[3]

§ 261. **American Situation.** What has just been said is particularly applicable to England, but also applies to this side of the Atlantic. The problems which pauperism presents have been so long neglected or improperly handled that its root has spread until its branches overshadow the land. The prevention of this growth is one of the greatest problems of our times. The development of this country has been so rapid; the foreign immigration has been so much faster than its proper assimilation; the massing of the population into cities has so increased; and the accumulation of material prosperity has been so enormous, with the indirect result of making the rich richer and the poor poorer—all within a comparatively few years—that as a result the grave questions of the old established civilization of Europe have surprised our younger institutions by their presence and have become of vital moment almost before we were aware of their existence.[4] Just who is poor enough to be deserving of relief will depend upon the circumstances and may even be a matter of discretion. Certainly courts cannot lay down any definite rules. "Judicial tribunals would have assumed a responsibility, burdensome because unnecessary, if they had barred testamentary relief for the deserving poor until some human test, of absolute certainty, could be applied to the moral condition, or until physical necessities could be brought to a fixed standard applicable to all persons."[5]

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[3] See 3 Int. J. Ethics 323, 327. The weak point of organized charity should also be noted. It inevitably creates a bureaucracy which tabulates the pedigree of families and houses and creates a circumlocation office whose aim is how not to give alms. Such a system engenders, on the part of suitors, a skill and persistency which is merely a counterpart of its own checks and guards against fraud.

[4] See 24 Alb. L. J. 346, 5 N. Y. St. Bar Ass'n 165. The above paragraph is taken chiefly from this paper.

[5] 1889, Bronson v. Strouse, 57 Conn. 147, 150, 17 Atl. 699.

§ 262. **Purpose of Chapter.** It is not the purpose of this chapter to enter into the economic, political and social aspects of this matter, but to present merely its legal side. Nothing more can be done than to state the existing law while leaving its improvement to the discretion of the legislative branch of the government. Not much abuse of a serious character has as yet resulted in this country.[6] Our eleemosynary charities are so young and so universally devoted to recognized charitable purposes that scandals have been few and far between. The experience of England, where such charities have frequently been found to be curses instead of blessings, should, however, be kept in mind with a view of preventing such a result in this country.

§ 263. **Churches as Relief Agencies.** It has been seen that eleemosynary charities originated with the Christian church and for ages were almost exclusively administered by ecclesiastical agencies. It would be surprising, to say the least, if they could not still be administered by the same agency. The contention that a church cannot take such gifts for its poor members because it is organized solely for religious and not for charitable purposes has, therefore, been said to involve the "monstrous proposition that charity is foreign to the purposes of Christian religious organizations."[7] Such a gift has been held not to be open to the objection that the church officers themselves might be the beneficiaries.[8] A gift to an unincorporated church "for poor children for their tuition" has, therefore, been upheld as germane to the objects of the church.[9] Nor need the trustees wait until absolute want has ensued. "It is the beautiful characteristic of our Christian charities, that they do not wait for penury and pauperism to invoke their benevolence. They know that in our country absolute destitution is the almost certain badge of profligacy; and they seek to maintain, even among the poorest, the honest pride which revolts at the idea of a confessed dependence upon alms."[10] There are degrees of pov-

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[6] See Section 209, supra.

[7] 1887, Succession of Auch, 39 La. Ann. 1043, 1045, 3 So. 227.

[8] 1906, Banner v. Rolf, 43 Tex. Civ. App. 88, 93, 94 S. W. 1125.

[9] 1897, Dye v. Beaver Creek Church, 48 S. C. 444, 455, 26 S. E. 717, 59 Am. St. Rep. 724.

[10] 1857, Cresson v. Cresson, Fed. Cas. No. 3,389, page 810, 6 Am. Law. Reg. 42, 5 Pa. Law. J. Rep. 431, 5 Clark 431.

erty and individual necessity. Therefore, a gift to a class of persons "partially unable to support themselves" is valid. It is not necessary that the charitable intent should be confined to those so absolutely destitute that the almshouse is their only place of refuge.[11] The same is true of a gift to aid and encourage and enable better to sustain themselves persons who "linger between competency and poverty," and who, by kindly assistance, sympathy and advice, may soon become self-sustaining and self-reliant.[12]

§ 264. **No Religious Character.** No denominational coloring necessarily inheres in such a charity though it is administered by ecclesiastical agencies. The charity itself is essentially non-sectarian in scope and becomes sectarian only by limitations and restrictions placed upon it by the donor.[13] Such a result is not brought about by the mere appointment of an ecclesiastical society as the trustee of an eleemosynary charity.[14] Neither is an eleemosynary corporation changed into a religious one by the fact that its membership is confined to the members of certain denominations.[15] Even the fact that a hospital is **owned** by a religious association does not mean that it is held for religious purposes.[16] It follows that a gift, which is not in terms confined to religious uses, does not assume the character of a religious donation merely because three of its seven trustees are clergymen.[17] Neither will a direction of a Roman Catholic donor to his trustees (one of them a Protestant), to erect and manage an orphan asylum to be known as St. James Roman Catholic Orphan Asylum, obligate such trustees to put the institution under the control of the Catholic Church.[18]

§ 265. **Homes. Classes of Beneficiaries.** One of the greatest misfortunes which can befall a person is to be set adrift in the world without a home. No one has expressed this

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[11] 1923, Kitchen v. Pitney, —— N. J. ——, 119 Atl. 675.

[12] 1923, Attorney General v. Lowell, —— Mass. ——, 141 N. E. 45, 47.

[13] 1883, White Lick Quarterly Meeting v. White Lick Quarterly Meeting, 89 Ind. 136, 156.

[14] Ibid.

[15] 1909, Baltzell v. Church Home and Infirmary, 110 Md. 244, 261, 268, 73 Atl. 151.

[16] 1922, People v. St. Mary's Roman Catholic Hospital, 306 Ill. 174, 137 N. E. 865.

[17] 1866, Miller v. Porter, 53 Pa. (3 P. F. Smith) 292, 297, 298.

[18] 1867, Attorney General v. Moore, 19 N. J. Eq. (3 C. E. Green) 503 (Affirming 18 N. J. Eq. (4 C. E. Green) 256).

thought more forcibly than Christ Himself when He said: "Foxes have holes, and the birds of the air have nests; but the Son of man hath not where to lay His head."[19] Such misfortune is certain to befall a considerable portion of the human family. Many children are orphaned or abandoned by their parents. There certainly are no beneficiaries more in need of protection, care and kindness, and none who have stronger claims than these waifs, helpless and abandoned upon the sea of life.[20] In addition, old men and women, at the other end of life, frequently find themselves without property or earning capacity after they have worn themselves out in the struggle for existence. Between these two extremes are such classes as working girls whose inadequate earning capacity does not enable them to maintain such home surroundings as are necessary for their moral, mental and physical well-being. Other young women are caught in the maelstrom of our city life and their only opportunity is afforded by houses of refuge. Widows left with small children but no property are in no mean plight. Sailors, whose home has been on board ship, are left without a roof over their head after they have worn themselves out by their strenuous work. Here, therefore, is a rich opportunity to provide a substitute for a home in the form of an institution.

§ 266. **Examples of Homes.** That such a purpose is charitable cannot admit of a doubt. Even where the aim is only temporary relief, it has been so recognized. Giving shelter to homeless people at night, irrespective of creed, color or condition, is certainly a charitable act.[21] Much more is permanent relief to such unfortunates a charitable object. A gift toward the erection of a building "for the sick and poor, those without homes,"[22] cannot but appeal to equity. Accordingly, gifts for orphanages,[23] homes for widows and their

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[19] Matthew 8, verse 20; Luke 9, verse 58.

[20] 1877, Ould v. Washington Hospital, 95 U. S. 303, 311, 312, 24 L. Ed. 450 (Affirming 1 MacArthur 541, 29 Am. Rep. 605).

[21] 1894, In re Croxall, 162 Pa. 579, 29 Atl. 759.

[22] 1908, Bowden v. Brown, 200 Mass. 269, 86 N. E. 351, 128 Am. St. Rep. 419.

[23] 1911, Morris v. Nowlin Lumber Co., 100 Ark. 253, 267, 140 S. W. 1; 1877, In re Tobin, Myr. Prob. Rep. 134 (Cal.); 1896, In re Pearson, 113 Cal. 577, 584, 585, 45 Pac. 849, 1662; 1899, In re Upham, 127 Cal. 90, 93, 59 Pac. 315; 1885, Germain v. Baltes, 113 Ill. 29; 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 331, 84 N. E. 256, 122 Am. St. Rep. 169; 1882,

children,[24] lodging houses for destitute women,[25] old people's homes, whether open to both sexes,[26] or confined to women[27] or men,[28] or the members of a lodge,[1] homes for worthy working girls,[2] or for indigent seamen,[3] houses of refuge,[4] and maternity homes for unfortunate and wayward girls,[5] have been held to create valid charities. The same is true of a gift to a home to assist deserving applicants who are too poor to meet the financial requirements for admission.[6]

§ 267. **Hospitals. May be Commercial Ventures.** Sickness and injury are afflictions from which man cannot entirely

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St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86, 3 Ky. Law. Rep. 573; 1888, Hazeltine v. Vose, 80 Me. 374, 380, 14 Atl. 733; 1906, Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484; 1868, Attorney General v. Moore, 19 N. J. Eq. (4 C. E. Green) 503 (Affirming 18 N. J. Eq. (3 C. E. Green) 256); 1879, Burd Orphan Asylum v. School District, 90 Pa. 21; 1915, Rust v. Evenson, 161 Wis. 627, 155 N. W. 145; 1899, Duggan v. Slocum, 92 Fed. 806, 810, 34 C. C. A. 676 (affirming 83 Fed. 244); 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 191, 11 L. Ed. 205. As to what constitutes an orphan see 1859, Soohan v. Philadelphia, 33 Pa. (9 Casey) 9, 1 Grant Cas. 494.

[24] 1895, Guilfoil v. Arthur, 158 Ill. 600, 607, 41 N. E. 1009; 1901, Amory v. Attorney General, 179 Mass. 89, 104, 60 N. E. 391; 1890, Tyree v. Bingham, 100 Mo. 451, 465, 13 S. W. 952; 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 210, 79 S. W. 831; 1906, Rader v. Stubblefield, 43 Wash. 334, 350, 86 Pac. 560.

[25] 1922, McCran v. Kay, 93 N. J. Eq. 352, 115 Atl. 649.

[26] 1920, Jansen v. Godair, 292 Ill. 364, 127 N. E. 97, 100; 1913, In re Cleven, 161 Iowa 289, 292, 293, 142 N. W. 986; 1886, German Aged People's Home v. Hammerbacker, 64 Md. 595, 605, 3 Atl. 678, 54 Am. Rep. 782; 1865, Odell v. Odell, 92 Mass. (10 Allen) 1, 4; 1899, Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; 1915, Rust v. Evenson, 161 Wis. 627, 155 N. W. 145.

[27] 1902, Eliot's Appeal, 74 Conn. 586, 606, 51 Atl. 558; 1910, Ingleside Ass'n v. Nation, 83 Kans. 172, 174, 109 Pac. 984; 1915, Commonwealth v. Parr, 167 Ky. 46, 179 S. W. 1048; 1888, Hazeltine v. Vose, 80 Me. 374, 380, 14 Atl. 733; 1890, Chase v. Stockett, 72 Md. 235, 238, 19 Atl. 761; 1899, Cheatham v. Nashville Trust Co., 57 S. W. 202 (Tenn.); 1923, Institution for Savings v. Roxbury Home, 244 Mass. 583, 139, N. E. 301.

[28] "Aged, infirm or invalid gentlemen and merchants," 1857, Cresson v. Cresson, Fed. Cas. No. 3,389, page 809, 6 Am. Law. Reg. 42, 5 Pa. Law. J. Rep. 431, 6 Clark 431.

[1] 1918, O'Neill v. Odd Fellow's Home, 89 Ore. 382, 174 Pac. 148; 1922, De La Pole v. Lindley, 118 Wash. 395, 204 Pac. 15.

[2] 1900, Sherman v. Congregational Home Missionary Society, 176 Mass. 349, 351, 57 N. E. 702; 1904, In re Daly, 208 Pa. 58, 57 Atl. 180.

[3] 1912, Petition of Pierce, 109 Me. 509, 84 Atl. 1070; 1830, Inglis v. Sailors' Snug Harbor, 28 U. S. (3 Pet.) 99, 7 L. Ed. 617.

[4] 1894, Steven's Appeal, 164 Pa. 209, 30 Atl. 243.

[5] 1923, Weme v. First Church of Christ Scientist, 219 Pac. 618 (Ore.).

[6] 1922, Washington Loan and Trust Co. v. Hammond, 278 Fed. 569.

escape. Both are certain to occur in all strata of society, and frequently strike down persons who have no permanent home or are far away from it. Something must be done and done at once in such cases. The stricken individual cannot be left to lie where he fell as Lazarus lay at the door of the rich man. He must be taken care of, and if he has no money, charity must come to the rescue. Elaborate establishments are necessary properly to care for such cases and restore the afflicted to self-support. All the means discovered by medical science must be at command. The modern hospital is the agency to fill the requirements. From this, however, it does not follow that every hospital is a charitable institution. There are hospitals and sanitariums which are business ventures as much as are department stores. A hospital corporation incorporated as a corporation for profit, whose articles and by-laws do not mention charity, and to which no one has a right of access except on payment, is not a public charity though it indirectly serves charitable ends.[7]

§ 268. **Charitable Hospitals.** However, such cases are comparatively rare. The expenses connected with a modern hospital are so great that it ordinarily is a failure as a commercial venture. There is only one other alternative—to apply to the generosity of the charitably inclined. This necessarily renders the institution a charitable one. It has, therefore, been held that a gift to a Red Cross society for a hospital creates a valid charity not being intended for the benefit of the individual members of the society, but to promote its charitable objects.[8] A hospital association not conducted for profit, which devotes all its funds, including those received from patients, exclusively to the maintenance and improvement of the institution is, therefore, a charity in every sense of the word[9] and has been recognized as such by numerous cases.[10]

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[7] 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 328, 71 Atl. 1032; 1907, Gitzhoffen v. Holy Cross Hospital Ass'n, 32 Utah 46, 57, 88 Pac. 691, 8 L. R. A. (N. S.) 1161.

[8] 1904, In re Merchant, 143 Cal. 537, 541, 77 Pac. 475.

[9] 1913, Wharton v. Warner, 75 Wash. 470, 476, 135 Pac. 235; 1907, Adams v. University Hospital, 122 Mo. App. 675, 687, 99 S. W. 453.

[10] 1889, Kine v. Becker, 82 Ga. 563, 9 S. E. 828; 1897, Ingraham v. Ingraham, 169 Ill. 432, 450, 48 N. E. 561, 49 N. E. 320; 1922, Hart v.

§ 269. **Enumeration of the Statute of Elizabeth.** Homes and hospitals do not exhaust the possibilities of eleemosynary charities. This was recognized even at the time of Elizabeth. In consequence the enumeration of the statute of Elizabeth contains the following examples of eleemosynary charities: Relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, preferment of orphans, relief stock and maintenance for houses of correction, marriages of poor maids, supportation aid and help of young tradesmen, handicraftmen, and persons decayed, relief or redemption of prisoners or captives, aid or ease of any poor inhabitants concerning payments of fifteens, setting out soldiers and other taxes.[11] This is a formidable list. Nor has modern development, though it has rendered some of these purposes obsolete, decreased the number of such charities, but on the contrary, has increased them. The relief of the poor and unfortunate has afforded an almost unlimited field for charitable donations.[12] Even conceding that the orphaned, aged, insane, infirm and deformed on the one hand, and the shiftless, improvident, dissolute, the tramps and beggars on the other, should be handled by the state and not by privately administered public charity, there remain "as proper subjects for private benevolence wisely applied, the great class of those on the borderland of want, who need a temporary helping hand, adapted to each case, and whose steps can easily, by wise or by foolish guidance, be led either

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Taylor, 301 Ill. 344, 133 N. E. 857; 1913, Dykeman v. Jenkines, 179 Ind. 549, 555, 101 N. E. 1013, Ann. Cas. 1915, D. 1011; 1901, Ellenherst v. Pythian, 110 Ky. 923, 925, 23 Ky. Law. Rep. 354, 63 S. W. 37; 1915, Mason County v. Hayswood Hospital, 167 Ky. 17, 179 S. W. 1050; 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 71 Atl. 1032; 1908, Ware v. Fitchburg, 200 Mass. 61, 66, 85 N. E. 951; 1911, Buchanan v. Kennard, 234 Mo. 117, 137, 136 S. W. 415; 1906, Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 563, 64 Atl. 190, 7 L. R. A. (N. S.) 496; 1868, Attorney General v. Moore, 19 N. J. Eq. (4 C. E. Green) 503 (Affirming 18 N. J. Eq. (3 C. E. Green) 256); 1915, Johnson v. Bowen, 85 N. J. Eq. 76, 81, 95 Atl. 370; 1914, Lindler v. Columbia Hospital, 98 S. C. 25, 81 S. E. 512; 1922, Harter v. Johnson, 122 S. C. 96, 115 S. E. 217; 1895, Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 655, 39 Pac. 95; 1894, Union Pacific Railroad Co. v. Artist, 60 Fed. 365, 368, 369, 9 C. C. A. 14, 19 U. S. App. 612, 23 L. R. A. 581; 1895, Pierce v. Union Pacific Railroad Co., 66 Fed. 44, 13 C. C. A. 323, 32 U. S. App. 48. See notes 25 Ann. Cas. 58, 63 Am. St. Rep. 264.

[11] 43 Eliz. Chapter 4.

[12] 1903, Grant v. Saunders, 121 Iowa 80, 82, 95 N. W. 411, 100 Am. St. Rep. 310.

into the paths of honest independence or the grim domain of pauperism."[13]

§ 270. **Cases within the Letter of the Statute.** The charities in the form of homes and hospitals, heretofore considered in this chapter, may well be comprehended under the words of the statute "relief of aged, impotent and poor people" and "preferment of orphans." Other modern examples, directly within its terms, are furnished by the decided cases. A bequest to endow two poor girls[14] falls under the head of marriages of poor maids. A pension, whether administered by the government,[15] by a city,[16] or by a camp association,[17] takes its place as maintenance of sick and maimed soldiers. A fund such as that created by Benjamin Franklin for the aid of young married artificers in Boston and Philadelphia,[18] or a trust to promote "the best interests of sewing girls in Boston,"[19] justifies itself as supportation aid and help of young tradesmen and handicraftmen. A gift for the emancipation of slaves before the Civil War[20] can be classified as relief or redemption of prisoners or captives. It would not be consistent with justice to favor the relief of those undergoing punishment for crimes of their own committing or imprisonment for not paying debts contracted by themselves and yet prohibit relief of slaves. It would be an anomaly in a system of law which recognizes as charitable the uses enumerated in the statute of Elizabeth to exclude from the field of charity a class of human beings so poor that they do not even own themselves, whose children cannot be educated, whose marriage has no sanction of law or security of duration, whose earnings belong to their master and who are subject, against the law of nature, and without any crime of their own, to such an arbitrary dominion as modern usages

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[13] See 24 Alb. L. J. 346, 348, 5 N. Y. St. Bar Ass'n 165.

[14] 1899, Succession of Meunier, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77.

[15] 1882, St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86, 89, 3 Ky. Law. Rep. 573.

[16] 1863, Russell v. Providence, 7 R. I. 566.

[17] 1911, Mobile v. Kierman, 170 Ala. 449, 54 So. 102.

[18] 1903, Boston v. Doyle, 184 Mass. 373, 380, 68 N. E. 851; 1893, Franklin v. Philadelphia, 2 Pa. Dist. Rep. 435, 438, 13 Pac. Co. Ct. Rep. 241.

[19] 1922, Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796, 799, 800.

[20] 1804, Charles v. Hunnicutt, 9 Va. (5 Call.) 311.

of nations will not countenance over captives taken from the most barbarous enemy.[21]

§ 271. **Analogous Cases.** Not all eleemosynary charities, however, can be brought directly within the terms of the statute. Many such charities were not thought of at the time of Elizabeth, but have arisen thereafter. The concentration of our population into cities, the unexampled development of the mechanical arts, and the general progress along all lines of activity, has produced new problems which in turn have bred new charities. These are as multiform as the conditions out of which they have arisen. Among others, peace societies,[1] foundling hospitals,[2] rescue missions,[3] deaf and dumb asylums,[4] medical schools giving free treatment,[5] manufacturing establishments for the blind,[6] clergy societies for the support of certain congregations,[7] fresh air funds to improve the morals and bodies of the poor and destitute,[8] Red Cross societies to prevent unnecessary barbarities in war, to alleviate suffering on the field of battle and to be of assistance in national calamities,[9] have been recognized as eleemosynary charities. Pensions to elderly people,[10] funds for the relief of striking textile workers at a certain city,[11] central homes for certain charitable societies to facilitate the active work carried on by them,[12] playhouses for children amid pure and attractive surroundings removed from the dangers of the streets,[13] have received equal recognition. A gift for the erection and control of model tenements to be rented out to worthy tenants in order to improve, by example and com-

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21 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 568.

1 1858, Tappan v. Deblois, 45 Me. 122, 132.

2 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434.

3 1899, Patterson Rescue Mission v. High, 64 N. J. Law 116, 44 Atl. 974.

4 1822, American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112.

5 1901, Collins v. New York Post-Graduate Medical School and Hospital, 69 N. Y. Supp. 106, 59 App. Div. 63.

6 1894, Commonwealth v. Louisville Trust Co., 16 Ky. Law. Rep. 131, 26 S. W. 582.

7 1856, Attorney General v. Clergy Society, 8 Rich. Eq. 190; s. c. 10 Rich. Eq. 604, 607 (S. C.).

8 1918, White v. Newark, 89 N. J. Eq. 5, 103 Atl. 1042.

9 1904, **In re** Merchant, 143 Cal. 537, 539, 77 Pac. 475.

10 1899, Succession of Meunier, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77.

11 1914, Attorney General v. Bedard, 218 Mass. 378, 385, 105 N. E. 993.

12 1915, **In re** Loeb, 152 N. Y. Supp. 879, 167 App. Div. 588.

13 1896, Smith's Estate, 5 Pa. Dist. Rep. 327, 328 (affirmed 181 Pa. 109, 37 Atl. 114).

petition, the sanitary conditions of other tenements whose accommodations are by private interest limited to mere obedience to the compulsions of law, is another example.[14] The same ruling has been made in regard to a donation to relieve the wants, distress and suffering arising from the many catastrophies resulting from the actions of the elements and the great suffering, distress, famine, and want caused by storms, floods, fires and other accidental and natural causes, and to aid and assist such of their victims as are worthy of assistance.[15] A Pennsylvania court has held that a bequest "to promote, aid and protect citizens of African descent in the enjoyment of their civil rights, as provided by the first section of the Fourteenth Amendment," creates a valid charity, since it seeks to remove a restraint under which the colored race is laboring.[16] However, a trust for the manumission of slaves has been held not to be charitable though it was sustained on other grounds.[17]

§ 272. **Temperance.** One of the great movements of the time relates to the liquor traffic. This movement, while it is political in some of its phases, is primarily a social one. Its object is to stamp out the great evil of intemperance with its train of vice, misery and crime. To this great purpose, men and women have devoted their property, their time, and in some instances their lives. In consequence, a temperance union has been held to be a charity within the tax exemption laws,[18] while the prevention of the use of intoxicating liquor, as a means of promoting individual and social welfare, has been emphatically declared to be a charitable purpose.[19] The adoption of the Eighteenth Amendment to the federal constitution does not affect the question here involved, for its adoption plainly has not fully accomplished the purpose of bettering the condition of those who suffer from the injurious consequences of intemperance caused by the use of intoxi-

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[14] 1895, Webster v. Wiggin, 19 R. I. 73, 97, 31 Atl. 824, 28 L. R. A. 510.

[15] 1904, Kronshage v. Varrell, 120 Wis. 161, 97 N. W. 928.

[16] 1891, Lewis Estate, 11 Pa. Co. Ct. Rep. 561, 1 Pa. Dist. Ct. Rep. 423 (affirmed 152 Pa. 477, 25 Atl. 878).

[17] 1858, Walker v. Walker, 25 Ga. 420.

[18] 1910, In re Moore, 122 N. Y. Supp. 828, 66 Misc. 116 (affirmed 128 N. Y. Supp. 1135, 143 App. Div. 973).

[19] 1881, Haines v. Allen, 78 Ind. 100, 102, 41 Am. Rep. 555.

cating liquors.[20] Therefore, a bequest for temperance is a charity,[21] though its trustee is an anti-saloon league, a no-license league or the prohibition party itself.[22]

§ 273. **Cruelty to Animals.** Another laudable movement of the age has for its object the prevention of cruelty to animals. Animals are subordinate to the will of man and powerless against his inventive genius. An abuse of them cannot but brutalize their abuser, while protection against such abuse cannot but have a salutory moral effect upon man himself.[23] Gifts "to benefit man through the medium of benefiting animals"[24] have, therefore, been declared to be charitable. A society for the prevention of cruelty to animals has been declared to be a charity because its members obtain no profit or pecuniary benefit, and its work in the education of mankind in the proper treatment of domestic animals, is instruction in one of the duties incumbent on us as human beings.[1] The suppression of vivisection has been held in England to be a charitable purpose.[2] "The motives which prompt bequests intended to relieve the suffering, or increase the comfort and enjoyment of animals, should be, and are, regarded as charitable, and should receive the same favorable consideration accorded like sentiments when manifested in behalf of human beings."[3] A gift for a fountain for the benefit of thirsty animals and birds is a charity and does not fail because it is not in terms limited to animals and birds useful to man.[4] The same is true in regard to a gift for the prevention of cruelty to animals and to an "animal rescue league,"[5] or for the establishment of a hospital for sick ani-

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[20] 1922, Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796, 799.

[21] 1890, People v. Dashaway Ass'n, 84 Cal. 114, 123, 24 Pac. 277, 12 L. R. A. 117; 1900, Harrington v. Pier, 105 Wis. 485, 521, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924. See note Am. and Eng. Ann. Cas. 1914 A 1215.

[22] 1915, Volunteers of America v. Peirce, 187 Ill. App. 428 (reversed 267 Ill. 406, 108 N. E. 318); 1914, Buell v. Gardner, 144 N. Y. Supp. 945, 948, 83 Misc. Rep. 513.

[23] 1872, In re Bonard, 16 Abb. Prac. (N. S.) 128, 187 (N. Y.).

[24] Tyssen on Charitable Bequests, 170, 6 Cyc. 924. Cited 1914, In re Coleman, 167 Cal. 212, 214, 138 Pac. 992.

[1] 1886, Massachusetts Society v. Boston, 142 Mass. 24, 27, 6 N. E. 840.

[2] 1914, In re Coleman, supra.

[3] 1909, In re Graves, 242 Ill. 23, 28, 89 N. E. 672, 134 Am. St. Rep. 302, 24 L. R. A. (N. S.) 283. See Notes 17 Am. and Eng. Ann. Cas. 139; Am. and Eng. Ann. Cas. 1915 C. 684.

[4] 1914, In re Coleman, supra.

[5] 1903, Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A.

mals unconnected with the Humane Society.[6] A gift of $1,000 for the benefit of testatrix's dog "Dick" has been upheld as being for a humane purpose within the Kentucky statute.[7]

§ 274. **Reformatories.** Large numbers of young persons of both sexes annually become the victims of vicious habits. This fact has led to the erection of reformatories both public and private. Such institutions may very properly be designated as hospitals for the cure of moral diseases.[8] They frequently are the only opportunity which their beneficiaries have of becoming useful citizens, and are charitable institutions[9] which will not, when properly conducted, be declared to be nuisances **per se.**[10]

§ 275. **Voluntary Fire Companies.** The public fire departments now maintained by practically all cities are the outgrowth of voluntary fire companies and illustrate clearly the tendency of eleemosynary charities toward complete absorption by the public authorities. Such companies have been recognized as charitable,[11] not authorized to divide their property among members,[12] or to divert it from the special objects for which it had been donated.[13] A gift to the permanent fund of a fire department relief association is also a charity, being not only in ease of the firemen who are members, but of the city, since it prevents families of deceased firemen from becoming public charges.[14]

(N. S.) 686, 97 Am. St. Rep. 420. See 1922, Pitney v. Bugbee, —— N. J. ——, 118 Atl. 780, s. c. 120 Atl. 927.

[6] 1922, McCran v. Kay, 93 N. J. Eq. 352, 115 Atl. 649.

[7] 1923, Willett v. Willett, 197 Ky. 663, 247 S. W. 739.

[8] 1885, Perry v. House of Refuge, 63 Md. 20, 26, 52 Am. Rep. 495.

[9] 1894, Williamson v. Louisville Industrial School, 95 Ky. 251, 24 S. W. 1065, 15 Ky. Law. Rep. 629, 23 L. R. A. 200, 44 Am. St. Rep. 243; 1895, In re Bartlett, 163 Mass. 509, 517, 40 N. E. 899; 1903, Corbett v. St. Vincent's Industrial School, 177 N. Y. 16, 68 N. E. 997 (Affirming 79 N. Y. Supp. 369, 79 App. Div. 334); 1909, Gallon v. House of Good Shepherd, 158 Mich. 361, 366, 122 N. W. 631, 133 Am. St. Rep. 387.

[10] 1912, French v. Association for Works of Mercy, 39 App. Dist. Col. 406.

[11] 1876, Bethlehem v. Perseverance Fire Co., 81 Pa. (31 P. F. Smith) 445, 458; 1844, Thomas v. Ellmaker, 1 Pars. Eq. Cas. 98, 107, 108, 1 Clark 502 (Pa.); 1919, Sherman v. Richmond Hose Co., 175 N. Y. Supp. 8, 14, 186 App. Div. 417.

[12] 1879, Appeal of Humane Fire Co., 88 Pa. 389. But see 1915, Neptune Fire Engine and Hose Co. v. Mason County, 166 Ky. 1, 14, 178 S. W. 1138.

[13] 1876, Harrisburg v. Hope Fire Co., 2 Pears. 269, 271 (Pa.).

[14] 1894, Jeanes Estate, 34 Wkly. Notes Cas. 190, 3 Pa. Dist.

§ 276. **Fire Patrols. Insurance Companies.** A more difficult question has arisen in connection with the fire patrols maintained by insurance companies for the purpose of extinguishing fires. Such patrols extinguish fires equally on insured and uninsured property and have, therefore, been declared to be public, charitable institutions acting in ease of the respective city governments in the preservation of life and property.[15] The weight of authority, however, is contrary to this contention, on the ground that the insurers merely act in their own interest and with a view to minimize their own losses.[16] In this view of the matter, the fact that such patrols have no provision for the payment of dividends, save life and property, and make no distinction between insured and uninsured property, and thus incidentally advance the public interest,[17] is immaterial.

§ 277. **Loans. Franklin Will.** Property to be loaned out may create a charitable trust.[18] No less a person than Benjamin Franklin in his will made provision for such a loan. Having laid the foundation for his fortune through the kind loan of money on the part of two friends, he wished to be useful in forming and advancing young men to be of service to their country. He, therefore, left a fund of one thousand pounds sterling each to the cities of Boston and Philadelphia to be loaned out at 5 per cent interest to young married artificers under the age of twenty-five years who had served an apprenticeship and had maintained a good moral character. This disposition has been maintained as a charitable one by both the Massachusetts[19] and Pennsylvania[20] courts.

Rep. 314, 316; 1871, Potts v. Philadelphia Ass'n for Relief of Disabled Firemen, 8 Phila. 326, 3 Leg. Gaz. 398.

[15] 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 646, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

[16] 1909, Coleman v. Fire Insurance Patrol of New Orleans, 122 La. 626, 637, 638, 48 So. 130, 21 L. R. A. (N. S.) 810; 1910, Rady v. Fire Insurance Patrol of New Orleans, 126 La. 273, 52 So. 491, 139 Am. St. Rep. 511; 1890, Newcomb v. Boston Protective Department, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778.

[17] 1915, Sutter v. Milwaukee Board of Fire Underwriters, 161 Wis. 615, 617, 155 N. W. 127, Ann. Cas. 1917 E. 682.

[18] 1914, Baptist Home of Monroe County v. Gardner, 145 N. Y. Supp. 275. But see 1908, Tavshanjian v. Abbot, 112 N. Y. Supp. 583, 587, 59 Misc. Rep. 642 (modified 115 N. Y. Supp. 938, 130 App. Div. 863).

[19] 1903, Boston v. Doyle, 184 Mass. 373, 380, 68 N. E. 851.

[20] 1893, Franklin v. Philadelphia, 2 Pa. Dist. Rep. 435, 438, 13 Pac. Co. Ct. Rep. 241. It should

The New York supreme court has held that the fact that the charitable fund is to be loaned out to be repaid by the beneficiaries five years after they have entered upon their lives' work, does not make the gift non-charitable.[21] Certainly the fact that the testator speaks of his gift to a city for respectable poor as a loan does not deprive his donation of its charitable character.[22]

§ 278. **Loan Associations.** It does not follow from this, however, that associations for the lending of money are charitable institutions. "The leading purpose of an association is the purpose which determines its character. **Ex vi termini,** a benevolent or charitable association must be one whose leading purpose is benevolence or charity, and not the pecuniary advantage of its members."[23] The objects of an association for the purpose of lending money may be in the highest degree praiseworthy and desirable. A great deal of good may be done by them. Nevertheless, such a society is not for that reason a charitable one.[1] This applies to a savings association formed for the profit of its members, though it may incidentally promote economy and providence.[2] It also applies to a corporation organized to aid persons of moderate means to obtain insurance on their lives and to maintain the necessary payments on the same and to secure to the beneficiaries an immediate advance in case of death.[3] Similarly, saving banks, though incorporated to encourage habits of thrift and though they approximate somewhat to the character of charitable institutions, are not charities within the statute of Elizabeth.[4]

§ 279. **Summary.** The long enumeration of eleemosynary charities in the statute of Elizabeth was not intended to be exclusive even as applied to the needs of the time. Much less

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not be overlooked that this gift was not contested by Franklin's heirs and came before the courts after the donor was dead more than a century.

[21] 1922, In re Davidge Will, 193 N. Y. Supp. 245, 200 App. Div. 437.

[22] 1923, Attorney General v. Lowell, —— Mass. ——, 141 N. E. 45, 47.

[23] 1876, Sheren v. Mendenhall, 23 Minn. 92, 93.

[1] 1871, People v. Nelson, 3 Lans. 394 (reversed 46 N. Y. 477).

[2] 1876, Sheren v. Mendenhall, 23 Minn. 92.

[3] 1871, People v. Nelson, 3 Lans. 394 (reversed 46 N. Y. 477).

[4] 1923, Institution for Savings v. Roxbury Home, 244 Mass. 583, 139 N. E. 301.

can it be held to cover all eleemosynary charities of the present age. The strides which industrialism has made in the last one hundred years has created new needs which call loudly for new remedies. These accordingly have been devised and cover a wide field. In addition to such standard charities as hospitals for the sick and injured, homes for orphans and old people, for working girls and worn-out sailors, numerous other eleemosynary charities have been recognized. Chief among these are the protection of animals against cruelty, the preservation of man against his own intemperance, and the reform of boys and girls who have fallen upon evil ways. While a voluntary fire company is recognized as a charity, a fire patrol will not ordinarily receive the same recognition. While a fund created by Benjamin Franklin to be loaned out at interest has been recognized as charitable after it had long been in active operation, corporations created for the same purpose have been denied such recognition.

CHAPTER VII

EDUCATION

§ 290. **Schools. Generally.** Our age is an age of enlightenment. Education is the purpose of the humble country schools, the fine city primary and high schools, the splendid normal schools and state universities. It is equally the purpose of private schools, from the various parochial and Sunday schools at the bottom of the ladder, through a multitude of denominational colleges and seminaries, to the privately endowed universities. In addition, there are technical schools of all kinds, night schools, correspondence schools, lecture courses, libraries, technical and popular and the like. While some of these institutions, such as business colleges and correspondence schools, are frequently purely commercial, the great majority are charitable undertakings supported either by the state or by endowments, or by a great number of small contributions.

§ 291. **Education a true Charity.** Next to religion, education is the best means of human betterment. It unlocks to the enquirer the best thoughts of the best minds which the world has ever produced. It puts at the service of the scientist the experience of his predecessors. It gives to each succeeding generation a broader outlook on life. It enables physicians and surgeons to discover the reasons for the various ills which afflict humanity. It dispels superstition and ignorance and is, therefore, so universally recognized that in all the discussion, "What is charity?" there has never been a question but that it is a proper subject of a gift for charitable purposes.[1] It is not necessary that it minister directly to the physical wants of humanity. A library society has even been held not to be entitled to take as an institution established "for the relief of the unfortunate, and of those who live under the affliction of infirmities and of every sort of privations."[2] While its benefits may be confined to the

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[1] 1878, Second Religious Society v. Harriman, 125 Mass. 321, 327.

[2] 1836, In re Blenon, 2 Pa. Law. J. 250, 253, Brightly N. P. 338.

poor,[3] they may go outside of any such limitation,[4] and will not be unavailing because they shed their blessings like the dews of heaven upon the rich as well as the poor.[5] The maintenance of educational institutions, therefore, is a charitable use without reference to the wealth or poverty of those who receive a benefit from them.[6] "The elevating and beneficent influences which the general public receives from educational sources make every citizen a beneficiary thereof, and furnish complete justification for placing every educational trust, not strictly private, and having increased learning for its object, in the category of public charities."[7]

§ 292. **Importance and Early Recognition.** Nor is this recognition a recent development. After the close of the middle ages there were isolated educational movements in various European countries, and these received a strong impetus during and after the reformation of the sixteenth century. Schools of learning, free schools, and scholars in universities, as well as the education of orphans, are, therefore, expressly recognized by the statute of Elizabeth as charitable uses.[8] Life, however, in Elizabeth's time, before the tremendous advance in mechanics and medical science, before the advent of steam, electricity and gasoline, before the existence of automobiles, railroads and steamships, before communication by cable, telegraph, telephone and radio, before the penetration of the waters by submarines and of the air by aëroplanes, before the preservation of sound in phonographs and motion in pictures, was extremely simple. If education was important then it is imperative now. Accordingly, it has drawn to its support the good will of the most munificent donors and has resulted in charities whose magnificence beggars description.

§ 293. **Broad Aim.** No narrow sphere can be assigned

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[3] 1878, Clement v. Hyde, 50 Vt. 716, 28 Am. Rep. 522.

[4] 1832, American Academy v. Harvard College, 78 Mass. (12 Gray) 582, 594; 1900, Dexter v. Harvard College, 176 Mass. 192, 194, 57 N. E. 371; 1883, State v. Academy of Science, 13 Mo. App. 213, 216; 1907, Godfrey v. Hutchins, 28 R. I. 517, 520, 68 Atl. 317.

[5] 1857, Price v. Maxwell, 28 Pa. (4 Casey) 23, 34.

[6] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed) 305, 347; 1902, Hyde v. Hyde, 64 N. J. Eq. 6, 9, 53 Atl. 593.

[7] 1907, Washburn College v. O'Hara, 75 Kans. 700, 704, 705, 90 Pac. 234.

[8] 43 Eliz. Chapter 4.

to this form of charity. It not merely develops the memory and trains the mind, but hardens the body and mellows the heart. It does not stop its work when a person is fourteen or twenty-one, or arrives at any other artificial age limit, but benefits him to the very moment when body and soul are rent asunder. It is not confined to either popular education or technical knowledge. It is not satisfied to impart useful knowledge in the narrow sense of the term, but aims to supply its beneficiaries with the higher pleasures of life which alone are worthy of rational human beings. It seeks to touch men, women and children in all the multiform conditions of life in which it finds them, and to elevate all whom it touches. Its aims are to better social conditions and to bring mankind nearer to the ideal of its creator. Educational purposes are thus "not merely the means of instruction in grammar, or mathematics, or the arts and sciences, but all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, purify the heart, elevate the affections, and to inculcate generous and patriotic sentiments, and to form the manners and habits of rising generations, and so fit them for usefulness in their future stations."[9]

§ 294. **Education by Religious Agencies.** The great majority of all private schools in this country have been founded by persons religiously inclined. In consequence religious instruction has had an important part in their curriculum. This is no valid objection. "No person in this country in this enlightened age, where and when liberty of conscience and of religious belief and of religious practices is unbounded and universal, will say that those having in charge the direction of the affairs of an institution in which young men and young women are received for instruction and education in secular branches shall not provide that these youths may attend services for the worship of Almighty God, and own and maintain suitable buildings for such purposes, even though such institution be incorporated under the laws of the State."[10]

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[9] 1873, Sargent v. Cornish, 54 N. H. 18, 22.

[10] 1918, Lightfoot v. Poindexter, 199 S. W. 1152, 1165 (Tex. Civ. App.).

§ 295. **Purpose of Chapter.** It is not the purpose of this chapter to deal with the public school system or any of its links from the kindergarten to the university. While all these institutions are educational, they are charities of a municipal character because they are supported by taxation, just like capitols, courthouses, city and town halls, or like the bridges, ports, havens, causeways, seabanks and highways mentioned in the statute of Elizabeth, and, therefore, find their proper place in another chapter.[11] These public agencies, however, do not exhaust the field of educational charities. Despite the universality of the public school system, there is no such surfeit of educational facilities that no opportunity exists for promoting the intellectual development and manual skill and efficiency of young people by the establishment of private schools.[12] That there is a system of free schools, therefore, does not interfere with a donor's design to establish a free school.[13]

§ 296. **Broad extent of Education.** The broad meaning of the word education has already been indicated. All gifts for educational purposes in their ever-varying diversity are covered by it.[14] It "includes any department or extent of education primarily and fairly calculated to make the recipient self-supporting. A gift is not without the bounds of charity because the training contemplated thereby may include special or specific education."[15] Therefore, any gift "of real or personal estate, either **inter vivos,** or by will, to promote education, is a charity."[16] Hence, educational purposes in general have been universally recognized as charitable.[17]

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[11] See Chapter Nine.

[12] 1914, Wilson v. First National Bank, 164 Iowa 402, 416, 145 N. W. 948, Ann. Cas. 1916 D. 481.

[13] 1916, Bolick v. Cox, 145 Ga. 888, 90 S. E. 54.

[14] 1916, Albuquerque Board of Education v. School District No. 5, 21 N. M. 624, 157 Pac. 668.

[15] 1911, In re Robinson, 203 N. Y. 380, 387, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

[16] 1851, Zanesville Canal and Mfg. Co. v. Zanesville, 20 Ohio 483, 488.

[17] 1906, McDonald v. Shaw, 81 Ark. 235, 243, 98 S. W. 952; 1898, Grand Prairie Seminary v. Morgan, 171 Ill. 444, 450, 49 N. E. 516 (Affirming 70 Ill. 575); 1888, Skinner v. Harrison, 116 Ind. 139, 142, 18 N. E. 529, 2 L. R. A. 137; 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 794; 1914, Wilson v. First National Bank, 164 Iowa 402, 410, 145 N. W. 948, Ann. Cas. 1916 D. 481; 1901, Haynes v. Carr, 70 N. H. 463, 483, 49 Atl. 638; 1857, Chapin v. School District, 35 N. H. 445, 453; 1877, Stevens v. Shippen, 28 N. J. Eq. (1 Stew.) 487, 533 (affirmed 29 N. J. Eq.

§ 297. **Test of Charitable Character.** Of course, not every educational purpose is charitable.[18] A university may or may not be a charity, since it may be conducted for the benefit of the public or for mere private ends.[19] An incorporated college controlled by a church body is not for that reason alone a public charity. It may, nevertheless, be a corporation for profit.[1] A medical school which gives instruction in surgery for a consideration is not a charitable institution,[2] even though it indirectly serves charitable ends.[3] No absolute rule can, therefore, be laid down for all cases "as to what shall or shall not be regarded as educational in the sense in which that word is used in connection with public charities."[4] Where, however, an educational institution has all the earmarks of a profit-making venture, it is entirely safe to say that it is not a charity.

§ 298. **Primary Schools.** At the very base of education is the primary school. This, in the cities, is frequently an imposing building, while in the country it may and frequently is very humble indeed. Yet, its importance cannot be overestimated. Without a sound primary training the foundation for a successful course in the high schools and universities is lacking. Many a successful business or professional man owes his earliest inspiration to this agency. "Not a few, filling respectable positions in society, point to the way-

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602, affirmed 106 U. S. 505, 1 S. Ct. 200, 27 L. Ed. 139); 1848, Baldwin v. Baldwin, 7 N. J. Eq. (3 Halst.) 211; 1910, Princeton University v. Wilson, 78 N. J. Eq. 1, 3, 78 Atl. 393; 1905, School Trustees of Hoboken v. Hoboken, 70 N. J. Eq. 630, 634, 62 Atl. 1; 1874, Gerke v. Purcell, 25 Ohio St. 229, 243; 1912, Hill v. Tuslatin Academy, 61 Ore. 190, 195, 121 Pac. 901; 1913, Albany College v. Monteith, 64 Ore. 356, 360, 130 Pac. 633; 1850, Calhoun v. Furgeson, 3 Rich. Eq. 160, 162 (S. C.); 1819, Dartmouth College v. Woodward, 17 U S. (4 Wheat.) 518, 4 L. Ed. 629; 1860, Perin v. Carey, 65 U. S., 24 How. 465, 507, 16 L. Ed. 701; 1883, Russell v. Allen, 107 U. S. 163, 172, 27 L. Ed. 397, 2 S. C. 327 (Affirming Fed. Cas. No. 12,149, 5 Dill. 235, 8 Cent. L. J. 314); 1900, John v. Smith, 102 Fed. 218, 42 C. C. A. 275. See notes in 63 Am. St. Rep. 258, 14 L. R. A. (N. S.) 97, 37 L. R. A. (N. S.) 1007.

[18] 1908, In re Shattuck, 193 N. Y. 446, 455, 86 N. E. 455.

[19] 1896, Spence v. Widney, 46 Pac. 463, 466 (Cal.).

[1] 1916, Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649.

[2] 1882, People v. Cothran, 27 Hun. 344 (N. Y.).

[3] 1889, Stratton v. Physio-Medical College, 149 Mass. 505, 21 N. E. 874, 5 L. R. A. 33, 14 Am. St. Rep. 442.

[4] 1911, Richardson v. Essex Institute, 208 Mass. 311, 318, 94 N. E. 262.

side school as the place of their early instruction."[5] However humble it may be, such a school is, therefore, a public charity,[6] entitled to the same protection which is enjoyed by the most pretentious institution of learning. In fact, common school education is so much favored, that a gift for the education of certain children will be construed to refer to ordinary common school education on the ground that, if any other kind was intended, the donor should and would have indicated it.[7]

§ 299. **High schools, Colleges, Universities.** Next to primary schools, high schools and colleges perform the most important functions. "The general benefit to the community derived from the diffusion of knowledge, which such institutions promote, is enough to justify their foundation and permanent endowment."[8] A college for the dissemination of universal knowledge not only advances the happiness and welfare of its students, but benefits society generally.[9] Such colleges are, therefore, generally recognized as charitable,[10] though they are denominational[11] or confined to the education of one sex.[12] What has been said of colleges, of course, also holds good as to universities.[13]

§ 300. **Scholarships, Professorships.** A gift need not be

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[5] 1848, Wright v. Linn, 9 Pa. (9 Barr.) 433, 439.

[6] 1847, School Directors v. Dunkelberger, 6 Pa. (6 Barr.) 29; 1899, Handley v. Palmer, 91 Fed. 948, 953 (Affirmed 103 Fed. 39, 43 C. C. A. 100).

[7] 1906, Hunt v. Edgerton, 29 Ohio Cir. Ct. Rep. 377, 381, 19 Ohio Cir. Ct. Dec. 377 (Affirmed 75 Ohio St. 594, 80 N. E. 1126).

[8] 1895, Webster v. Wiggin, 19 R. I. 73, 97, 31 Atl. 824, 28 L. R. A. 510.

[9] 1912, Hill v. Tualatin Academy, 61 Ore. 190, 196, 121 Pac. 901.

[10] 1887, Raley v. Umatilla County, 15 Ore. 172, 182, 13 Pac. 890, 3 Am. St. Rep. 142; 1888, Bates v. Palmetto Society, 28 S. C. 476, 481, 6 S. E. 327; 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan) 348, 367, 368; 1833, Allen v. McKean, Fed. Cas. No. 229, 1 Sumn. 276; 1902, Currier v. Dartmouth College, 117 Fed. 44, 48, 54 C. C. A. 430.

[11] 1901, In re Stewart, 26 Wash. 32, 35, 66 Pac. 148, 67 Pac. 723; 1915, Rust v. Evenson, 161 Wis. 627, 155 N. W. 145.

[12] 1889, Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785; 1881, Taylor v. Bryn Mawr College, 34 N. J. Eq. (7 Stew.) 101, 104; 1884, Appeal of Curran, 4 Pa. Supreme Ct. Rep. (4 Penny) 331 (Affirming 15 Phila. 84); 1880, Carleton v. Roberts, 1 Posey Unreported Cas. 587, 591 (Tex.).

[13] 1905, Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991; 2 L. R. A. (N. S.) 556 (affirming 121 Ill. App. 512). A gift for the establishment of a graduate college in connection with a university therefore creates a valid charity. 1910, Princeton University v. Wilson, 78 N. J. Eq. 1, 3, 78 Atl. 393.

made generally to the founding and support of particular schools, colleges or universities, but may confine itself to some particular need of such an institution. It may be content with merely founding a scholarship to encourage students to higher efforts,[14] or with providing medals to be awarded to meritorious scholars,[15] or may establish an endowment fund for the education of worthy young men and women of a certain school district.[16] It may provide that the beneficiaries shall obligate themselves to repay to the fund starting five years after beginning their lives' work the sum advanced to them.[17] It may create or endow a professor's chair on such subjects as theology,[18] agricultural chemistry,[19] political economy,[20] the fine arts,[21] and be and remain a charity in the full sense of the word.[22] Since an executive officer is absolutely necessary, the endowment of a president's chair falls within the same class.[23] Since teachers are frequently underpaid, a gift to increase their salary is as much a charity as a gift directly to the school with which they are connected.[1] Indeed such means, particularly scholarships and professorships, excellently serve the double purpose of making many small gifts effective to a common end, and of perpetuating the donor's memory. While they may occasionally result in the establishment of a chair which has no real living purpose, their effect on the whole is most beneficial and deserves all the support given to it by the law.

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[14] 1919, Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699; 1900, Dexter v. Harvard College, 176 Mass. 192, 195, 57 N. E. 371; 1898, Kurzman v. Lowy, 52 N. Y. Supp. 83, 23 Misc. Rep. 380; 1855, Newell's Appeal, 24 Pa. (12 Harris) 197; 1912, Taylor v. Columbian University, 226 U. S. 126, 136, 33 S. Ct. 73 (Affirming 35 App. Dist. Col. 68).

[15] 1895, In re Bartlett, 163 Mass. 509, 40 N. E. 899.

[16] 1920, Musser v. Musser, 281 Mo. 649, 221 S. W. 46.

[17] 1922, In re Davidge Will, 193 N. Y. Supp. 245, 200 App. Div. 437.

[18] 1922, Bailey v. Waddy, 195 Ky. 415, 243 S. W. 21.

[19] 1892, Brewer v. University of North Carolina, 110 N. C. 26, 14 S. E. 644.

[20] 1899, In re Royer's Estate, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, 369.

[21] 1858, Cresson's Appeal, 30 Pa. (6 Casey) 437, 451.

[22] 1884, Barnum v. Baltimore, 62 Md. 275, 296, 50 Am. Rep. 219; 1900, Associate Alumni v. General Theological Seminary, 163 N. Y. 417, 57 N. E. 626 (modifying 49 N. Y. Supp. 745, 26 App. Div. 144). See 1922, Appeal of Lafayette College, 273 Pa. 1, 116 Atl. 532.

[23] 1914, Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 727, 175 S. W. 571.

[1] 1857, Price v. Maxwell, 28 Pa. (4 Casey) 23, 38; 1895, In re Bartlett, 163 Mass. 509, 516, 40 N. E. 899.

§ 301. **Incidental Needs of Schools, Particular Classes of Beneficiaries.** Educational purposes are not exhausted by the endowment of schools, or by the creation of scholarships, or the establishment of chairs. Other educational needs readily suggest themselves. A donor may, therefore, create valid charities to establish an observatory[2] to promote agricultural and horticultural improvements, or other philosophical or philanthropic purposes[3] to fit young men for admission to the naval academy,[4] to train young men in naval architecture and marine engineering,[5] to found an institution in the nature of a chautauqua,[6] to teach young mariners the art of navigation,[7] to educate young persons in the domestic and useful arts,[8] or train them in the mechanical arts and industries,[9] to instruct children in the nature of their physical organs, more especially their sexual organs, so that they may observe and obey the law of health,[10] to teach a trade, handicraft, business or profession,[11] or to found a literary fund for the use of a college.[12] He may direct his benefactions toward some unfortunate class such as the blind, the deaf, the dumb. A purpose so honorable and noble, so free from the dross of self-interest as is the pouring of instruction into the minds of the members of this class, elevating them from the lowest degradation of intellect, and shaping them into moral, religious and intellectual beings, opening their blind eyes, or unstopping their deaf ears, is certainly charitable.[13] A donor may even go beyond the mental needs of his beneficiaries and provide that they be furnished "with necessary clothing while attending school."[14]

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[2] 1896, Spence v. Widney, 46 Pac. 463, 466 (Cal.).

[3] 1870, Rotch v. Emerson, 105 Mass. 431.

[4] 1905, Columbian University v. Taylor, 25 App. D. C. 124, 130. Approved 1910, Taylor v. Columbian University, 35 App. D. C. 68 (affirmed 226 U. S. 126, 33 S. Ct. 73).

[5] 1920, Massachusetts Institute of Technology v. Attorney General, 235 Mass. 288, 126 N. E. 521.

[6] 1921, Wachovia Banking and Trust Co. v. Ogburn, 181 N. C. 324, 107 S. S. 238.

[7] 1895, In re Bartlett, supra.

[8] 1886, Webster v. Morris, 66 Wis. 366, 397, 28 N. W. 353, 57 Am. Rep. 278.

[9] 1896, People v. Cogswell, 113 Cal. 129, 136, 45 Pac. 270, 35 L. R. A. 269.

[10] 1923, In re Hart's Will, 200 N. Y. Supp. 63, 205 App. Div. 703.

[11] 1915, Curtis Estate, 88 Vt. 445, 451, 92 Atl. 965.

[12] 1918, Amory v. Amherst College, 229 Mass. 374, 118 N. E. 933.

[13] 1822, American Asylum v. Phoenix Bank, 4 Conn. 172, 177, 10 Am. Dec. 112.

[14] 1869, Swasey v. American Bible Society, 57 Me. 523, 526.

He may direct that the school established limit its teaching force to women, and may provide that "no book of instruction is to be used to teach except spelling books and the Bible."[15] He may exclude all fads and fancies with which modern education is encumbered and hold the institution down to the absolute essentials.

§ 302. **Libraries.** The charities so far considered deal with organized school life in one form or another, with teachers and pupils. This is not essential. Educational charities seek to reach persons whose daily tasks do not permit them to attend school in any form. The most common means of accomplishing such a purpose is to be found on every hand in the form of libraries which accordingly are universally recognized as charities,[16] though they are not enumerated in the statute of Elizabeth.[17] Says the Pennsylvania court: "The educational influence of great libraries has been recognized by all civilized people in all ages. They have been the refuge and preservers of knowledge in the darkest times of ignorance and superstition; the source and rallying point of awakened interest in philosophy and science, wherever the human mind has aroused itself to a new search for intellectual light; and the glory and pride of nations, in exact proportion as they have attained a higher plane of enlight-

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[15] 1862, Tainter v. Clark, 87 Mass. (5 Allen) 66.

[16] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 556, 96 S. W. 155, 7 L. R. A. (N. S.) 485; 1913, In re Budd, 166 Cal. 286, 288, 135 Pac. 1131; 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 315, 82 Atl. 582; 1893, Crerar v. Williams, 145 Ill. 625, 643, 34 N. E. 467, 21 L. R. A. 454 (Affirming 44 Ill. App. 497); 1912, Franklin v. Hastings, 253 Ill. 46, 50, 97 N. E. 265, Ann. Cas. 1913 A. 135; 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434; 1914, Wilson v. First National Bank, 164 Iowa 402, 145 N. W. 948, Ann. Cas. 1916 D. 481; 1888, Dascomb v. Marston, 80 Me. 223, 232, 13 Atl. 888; 1895, In re Bartlett, 163 Mass. 509, 516, 40 N. E. 899; 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 197, 41 N. E. 231; 1899, Lackland v. Walker, 151 Mo. 210, 241, 52 S. W. 414; 1922, In re Secrest Estate, —— Neb. ——, 191 N. W. 663; 1909, Keene v. Eastman, 75 N. H. 191, 192, 72 Atl. 213; 1881, Brown v. Pancoast, 34 N. J. Eq. (7 Stew.) 321, 324; 1902, Lanning v. Commissioners of Public Instruction, 63 N. J. Eq. 1, 6, 51 Atl. 787; 1905, School Trustees of Hoboken v. Hoboken, 70 N. J. Eq. 630, 634, 62 Atl. 1; 1918, Camp v. Presbyterian Society of Sacket's Harbor, 173 N. Y. Supp. 581, 105 Misc. 139; 1873, Appeal of Williams, 73 Pa. (23 P. F. Smith) 249; 1882, Jones v. Habersham, 107 U. S. 174, 189, 27 L. Ed. 401, 2 S. C. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443); 1899, Duggan v. Slocum, 92 Fed. 806, 810, 34 C. C. A. 676 (Affirming 83 Fed. 244).

[17] 1865, Drury v. Natick, 92 Mass. (10 Allen) 169, 182.

ened and progressive civilization. It is the concurrent and universal opinion of scholars that no single event in recorded history has been so great a misfortune to the interests of pure learning as the destruction of the Alexandrine Library.''[18] A gift for a library, therefore, is an object which the law favors and a trust which equity enforces.[19] It makes no difference that the members of the association which controls such an institution enjoy all its privileges,[20] or that they are accorded somewhat greater privileges than are enjoyed by the general public.[21] The library need not be general in its character, but may confine itself to certain classes of books without losing its charitable character.[1] It may circulate such books,[2] or actually distribute them,[3] or may content itself with aiding clubs of working men in the establishment of libraries.[4] It may go beyond mere library purposes and be devoted in addition to lecture rooms, cabinets of natural history and mechanical inventions, and to a course of lectures on the physical sciences.[5]

§ 303. **Miscellaneous Examples.** Schools and libraries, while they are the principal means of spreading knowledge, are not the only instruments for this purpose. An academy of science is a most valuable adjunct of both a school and a library and is, therefore, a charity in every sense of the word.[6] The same is true of a museum of natural history and of a botanical garden.[7] The World's Peace Foundation is in

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[18] 1877, Philadelphia Library Co. v. Donahugh, 12 Phila. 284, 285 (Approved and adopted 1878, Donahugh's Appeal, 86 Pa. 306, 309).

[19] 1880, Manners v. Philadelphia Library, 93 Pa. 165, 174, 39 Am. Rep. 741.

[20] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 555, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[21] 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434; 1903, Minns v. Billings, 183 Mass. 126, 132, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420.

[1] 1888, Hutchins v. George, 44 N. J. Eq. (17 Stew.) 124, 14 Atl. 108 (Reversed on another point 45 N. J. Eq. (18 Stew.) 757, 18 Atl. 881, 4 Am. St. Rep. 754, 6 L. R. A. 511).

[2] 1888, Hutchins v. George, **supra.**

[3] 1848, Pickering v. Shotwell, 10 Pa. (10 Barr) 23, 26.

[4] 1854, Sweeney v. Sampson, 5 Ind. 465, 476.

[5] 1855, New Orleans v. Mechanic's Society, 10 La. Ann. 282.

[6] 1912, Lynch v. South Congregational Parish of Augusta, 109 Me. 32, 38, 82 Atl. 432; 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 8 S. W. 346; 1882, Jones v. Habersham, 107 U. S. 174, 189, 27 L. Ed. 401, 2 S. C. 336 (Affirming Fed. Cas. No. 7,465, 5 Woods 443).

[7] 1911, Richardson v. Essex Institute, 208 Mass. 311, 318, 94 N. E. 262; 1899, Lackland v. Walker, 151 Mo. 210, 241, 52 S. W. 414;

the same class, since the final establishment of universal peace among all the nations of the earth manifestly is an object of public charity.[8] A nation's art is the flower of its civilization. The study of its masterpieces is in itself an education which refines and enriches the mind. An institute for the promotion of the fine arts, the arts whose aim is beauty rather than utility is, therefore, a valid charity,[9] particularly where studios for the advancement of education in art are connected with it,[10] or where it provides prices for the best works of art produced and thus rouses the ambition of the artists, sharpens the judgment of the critics, attracts the public attention, enlists universal sympathy, and creates an atmosphere in which the fine arts can flourish.[11] An endowment for the prosecution of research in our colonial history, and the gathering and preservation of the papers having relation thereto, is of great public interest, is valuable to future historians, and is a charitable purpose,[12] as is also an historical society.[13] The same is true of proper monuments. "The erection of a noble work of art as a monument or memorial to a great spiritual leader (Phillips Brooks) is a public charity. It is a means of education and a source of inspiration."[14] A gift for the erection in a park of a monument "dedicated to and illustrative of music, which said monument shall be designed and executed in such manner as at once to instruct and adorn," therefore is valid, the word "monument" being used in a wider sense.[15] A geo-

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1882, Jones v. Habersham, **supra.** See 1901, **In re** Winchester, 133 Cal. 271, 273, 65 Pac. 475, 54 L. R. A. 281.

[8] 1917, Parkhurst v. Treasurer and Receiver General, 228 Mass. 196, 117 N. E. 39.

[9] 1891, Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414; 1920, Herron v. Stanton, —— Ind. App. ——, 128 N. E. 363, 366.

[10] 1909, Mason v. Bloomington Library Ass'n, 237 Ill. 442, 449, 86 N. E. 1044 (Reversing 143 Ill. App. 309); 1901, Farmers Loan and Trust Co. v. Ferris, 73 N. Y. Supp. 475, 479, 67 App. Div. 1.

[11] 1891, Almy v. Jones, 17 R. I. 265, 269, 21 Atl. 616, 12 L. R. A. 414. See 1858, Cresson's Appeal, 30 Pa. (6 Casey) 437, 451.

[12] 1904, Colbert v. Speer, 24 App. D. C. 187, 205, 206 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403). See also 1910, Molly Varnum Chapter v. Lowell, 204 Mass. 487, 90 N. E. 893.

[13] 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 8 S. W. 346; 1883, Carpenter v. Historical Society, 2 Dem. Sur. 574 (N. Y.). But see 1922, Pitney v. Bugbee, —— N. J. ——, 118 Atl. 780, s. c. 120 Atl. 937.

[14] 1919, Eliot v. Trinity Church, 232 Mass. 517, 521, 122 N. E. 648.

[15] 1918, Rhode Island Hospital Trust Co. v. Benedict, 41 R. I. 143, 103 Atl. 146.

graphic society for the permanent establishment in New York of an institution in which to collect, classify and arrange geographical and scientific works, voyages, travels, maps, charts, globes, instruments, documents, manuscripts, engravings, etc., to be accessible to the public, is sufficiently akin to a library to be a charity.[16] While the Massachusetts court has held that trusts whose express purpose is to bring about changes in the laws or political institutions of the country, such as woman suffrage effective before the Nineteenth Amendment of the federal constitution,[17] are not charitable so as to be entitled to peculiar favor, protection and perpetuation from the ministers of those laws which they are designed to modify[18] the Illinois court has upheld a bequest "for the attainment of woman suffrage" as an attempt to alter the law according to the law.[19] The Pennsylvania court has held that a gift in trust "to promote improvements in the structure and the methods of government, with a special reference to the initiative, referendum, and recall, proportional representation, preferential voting, ballot reform, the simplification of municipal, state and national government, and the revision and re-making of city charters, state constitutions, and our national constitution, with a view to promote efficiency and popular control of government" is charitable.[20] The circulation of the works of Henry George, though they put under examination a part of our legal system, has been recognized as a purpose which may be aided by a charitable gift.[21] Examination and discussion, which in every other science are absolute essentials of proper development, should not be discouraged when they are applied to the law itself for the purpose of improving it. Gifts for the purpose of perpetuating the United States flag,[22] of furthering the broadest interpretation of metaphysical thought,[1] of

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[16] 1873, People v. Tax Commissioners, 11 Hun. 505 (N. Y.).

[17] 1922, Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796, 799.

[18] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 555.

[19] 1898, Garrison v. Little, 75 Ill. App. 402. See note 31 Ann. Cas. 1221.

[20] 1922, Taylor v. Hoag, 273 Pa. 194, 116 Atl. 826.

[21] 1889, George v. Braddock, 45 N. J. Eq. (18 Stew.) 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511 (Reversing 44 N. J. Eq. (17 Stew.) 124, 14 Atl. 108).

[22] 1873, Sargent v. Cornish, 54 N. H. 18, 23.

[1] 1916, Vineland Trust Company v. Westendorf, 86 N. J. 343, 98 Atl. 314.

spreading the light on social and political liberty and justice in these United States,[2] of providing a place where the doctrine of socialism can be taught by example as well as by precept,[3] of creating a public sentiment against negro slavery,[4] of giving premiums for certain scientific treatises,[5] have also been held to create valid charities. A gift to the "Friendship Liberal League," an organization opposed to all "isms" whose object through public lectures and other means is to establish the right of every person to express his cherished opinions, to promote just principles, to disseminate scientific truth, and to aid human progress, has been held to create an educational charity. Says the court: "An anti-ism society is as much a charity as an anti-tobacco society, or an anti-meat diet brotherhood, or an anti-chewing gum circle, or even as the famous 'United Metropolitan Improved Hot Muffin and Crumpet Baking and Punctual Delivery Company,' immortalized by Charles Dickens, would have been if it had devoted itself to teaching the English people how to bake."[6]

§ 304. **Amusements.** The world war has demonstrated that even the various forms of amusement, by relieving the ennui incident to military duty, particularly in the advanced zone of operations, have a claim to be classed among the charities. Nor is this claim confined to war conditions. Education is a broad field.[7] It includes the training and development of the body as well as that of the mind. One is hardly more important than the other. A proper form of dancing is good physical exercise and tends to promote health and vigor, and to develop bodily grace and poise. Certainly, where the dominant purpose of a testator is a library and lecture hall, the fact that a dance hall and other rooms for moral amusement are provided for as an inducement to draw the people to the institution does not render the gift invalid.[8] Therefore, a gift to a small city of an elaborate theater has

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[2] 1889, George v. Braddock, supra.

[3] 1911, Peth v. Spear, 63 Wash. 291, 295, 115 Pac. 164.

[4] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 558.

[5] 1892, Palmer v. Union Bank, 17 R. I. 627, 631, 24 Atl. 109.

[6] 1891, In re Knight, 10 Pa. Co. Ct. Rep. 225, 229.

[7] For Y. M. C. A. activities as charities see index under Y. M. C. A.

[8] 1917, Gibson v. Frye Institute, 137 Tenn. 452, 193 S. W. 1059, 1063. See Sec. 321, 322, 731.

been held to be charity of a municipal character because it enables the inhabitants to attend many public occasions and functions.[9]

§ 305. **Summary.** That education is a charitable purpose has been recognized by the statute of Elizabeth and has been entrenched and reëntrenched by numerous court decisions. Barring schools conducted as business ventures for commercial purposes, gifts to schools, high and low, public and private, general or special, have, therefore, been upheld. Donors have been encouraged to create scholarships and endow professor's chairs. Their gifts to receive recognition as educational charities need not, however, be connected with any classroom but may seek to spread knowledge by such means as the creation and support of libraries, museums, art institutes, historical societies, or by special gifts designed to further patriotism, woman suffrage, socialism, negro emancipation, medical science and the like.

[9] 1923, Nixon v. Brown, —— Nev. ——, 214 Pac. 524, 531.

CHAPTER VIII

MUNICIPAL PURPOSES

§ 316. **Generally.** Religion, education and benevolence, dispensed by private agencies, do not exhaust the vast field of charity. There is one additional means of reaching an indefinite class of beneficiaries. The state and its various agencies, from the metropolitan cities to the rural school districts, present an unlimited field for the attention of the charitably inclined. This was realized even by the statute of Elizabeth. Accordingly, taxes, relief stock and maintenance for houses of correction, repair of bridges, ports, havens, causeways, seabanks and highways have found a place in the enumeration of its preamble. Since a gift to a small body of indefinite persons is a charity, a gift to a larger body, and that the governing body of the community, is certainly no less such,[1] though it does nothing more than relieve the tax-paying class from a part of its burdens.[2] The fact that taxes are levied for the same purpose demonstrates the charitable character of the gift and tends to uphold rather than defeat it.[3] Nor will it make any difference that ample provisions have been made by law for the same purpose.[4] A gift to the state in trust to apply the same in executing a lawful governmental function, therefore, may very well create a valid charity.[5] Says the Massachusetts court: "A gift for a purpose confined to that which is national in the sense that it might be supported at public expense and by general taxation is a close approach to a charity."[6]

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[1] 1893, Franklin v. Philadelphia, 2 Pa. Dist. Rep. 435, 439, 13 Pa. Co. Ct. Rep. 241.

[2] 1897, **In re** Strong, 68 Conn. 527, 530, 37 Atl. 395; 1909, **In re** Graves Estate, 242 Ill. 23, 89 N. E. 672, 134 Am. St. Rep. 302, 24 L. R. A. (N. S.) 283. See 1921, Liggett v. Abbot, 192 Iowa 742, 185 N. W. 569.

[3] 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 377, 77 Atl. 565.

[4] 1910, Chapman v. Newell, 146 Iowa 415, 426, 125 N. W. 324; 1896, **In re** John, 30 Ore. 494, 508, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

[5] 1896, **In re** Yale College, 67 Conn. 237, 245, 34 Atl. 1036.

[6] 1917, Thorp v. Lund, 227 Mass. 474, 479, 116 N. E. 946, 949, Ann. Cas. 1918 B. 1204.

§ 317. **Governmental and Business Functions of Cities.** It must not be supposed, however, that a gift for any purpose which a city may pursue will necessarily be valid. Municipalities engage in many enterprises which are of a business rather than of a governmental nature. They conduct gas plants, waterworks and other similar business ventures. In this respect the legal situation is absolutely clear. While a gift for one of the departments of a city,[7] such as the fire department,[8] or for uses and purposes which promote the health and general prosperity of its inhabitants,[9] creates a valid charity, a gift for a city waterworks,[10] not to speak of a business men's club room,[11] will not have the same effect.[12] Waterworks or club rooms are no more charitable than is a street car or electric light plant.

§ 318. **Municipal Purposes Unattractive to the average Donor.** The imagination of donors has not been very deeply stirred by the contemplation of gifts to such municipal purposes. In consequence, comparatively few cases on the subject have come before the courts. There are enough of them, however, to make a treatment of the matter possible.

§ 319. **Public Schools.** The one subject above all others that has drawn to it the support of charitable donors is the public school system. "The common school system partakes much of the nature of a public charity, extends over the whole state, is sustained by the public moneys, and the directors, who devote much time and labor for the public benefit, receive no compensation for their services."[13] Gifts accordingly have been made and upheld to such agencies as a board of education,[14] or a school district,[15] a village,[16] or a county,[17]

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[7] 1884, Barnum v. Baltimore, 62 Md. 275, 298, 50 Am. Rep. 219.

[8] 1914, In re Weekes, 146 N. Y. Supp. 1006, 85 Misc. Rep. 230; 1833, Magill v. Brown, Fed. Cas. No. 8,952, Brightly N. P. 346, 14 Haz. Reg. Pa. 305.

[9] 1847, Girard v. New Orleans, 2 La. Ann. 897, 899.

[10] 1875, Doughten v. Vandever, 5 Del. Ch. 51, 68. But see 1889, Penny v. Croul, 76 Mich. 471, 479, 43 N. W. 649, 5 L. R. A. 858.

[11] 1897, Beurhans v. Watertown, 94 Wis. 617, 628, 69 N. W. 986.

[12] 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 181, 182.

[13] 1881, School District v. Fuess, 98 Pa. 600, 606, 42 Am. Rep. 627.

[14] 1848, Lewis v. Lusk, 35 Miss. 401, 421.

[15] 1921, Chandler v. Board of Education of Person Co., 181 N. C. 444, 107 S. E. 452.

[16] 1875, Hathaway v. Sackett, 32 Mich. 97, 100.

[17] 1922, Elliott v. Quinn, —— Neb. ——, 189 N. W. 173.

for promoting the efficiency of the public schools or for founding new schools,[18] for the upbuilding of the public schools of a certain district,[19] for the inculcation of the highest principles of honor and moral courage among students and graduates, and the practical encouragement and reward of the practice of such principles,[20] for helping to pay the wages of teachers,[21] and have ranged from the kindergarten,[22] through the common schools[23] and the high schools,[24] to the state[25] or city[26] universities. Whether or not the poor are mentioned in such a gift is immaterial.[1] Where they are not mentioned, a gift for the benefit of a public school will not be construed as a gift for the benefit of its scholars in such sense that school books may be purchased for such scholars as their personal property.[2] The fact that free schools are provided by law does not prevent either the creation of a new school,[3] or the maintenance of an existing school[4] by a charitable gift. A gift to improve and elevate to a higher level the standard of practical education in a certain township may be on condition that in no event and at no time shall any part thereof be used to lower the tax rate of such

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[18] 1895, Webster v. Wiggin, 19 R. I. 73, 93, 31 Atl. 824, 28 L. R. A. 510.

[19] 1921, Liggett v. Abbott, 192 Iowa 742, 185 N. W. 569.

[20] 1921, In re Barnwell, 269 Pa. 443, 112 Atl. 535.

[21] 1891, Rushmore v. Rushmore, 59 Hun. 615, 12 N. Y. Supp. 776, 35 N. Y. St. Rep. 845.

[22] 1903, Owatonna v. Rosebrook, 88 Minn. 318, 92 N. W. 1122.

[23] 1867, Heuser v. Harris, 42 Ill. 425; 1876, Craig v. Secrist, 54 Ind. 419, 425; 1907, Barker v. Petersburg, 41 Ind. App. 447, 451, 82 N. E. 996; 1910, Chapman v. Newell, 146 Iowa 415, 427, 125 N. W. 324; 1884, Leeds v. Shaw, 82 Ky. 79; 1853, State v. McDonogh, 8 La. Ann. 171; 1891, Davis v. Barnstable, 154 Mass. 224, 28 N. E. 165; 1895, Attorney General v. Briggs, 164 Mass. 561, 42 N. E. 118; 1906, Crow v. Clay County, 196 Mo. 234, 277, 95 S. W. 369; 1913, Smart v. Durham, 77 N. H. 56, 57, 86 Atl. 821; 1882, Iseman v. Myers, 26 Hun. 651 (N. Y.); 1896, In re John, 30 Ore. 494, 507, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; 1855, Gass v. Ross, 35 Tenn. (3 Sneed) 211, 213; 1858, Bell County v. Alexander, 22 Tex. 350, 362, 73 Am. Dec. 268.

[24] 1881, Piper v. Moulton, 72 Me. 155, 159; 1875, Hathaway v. Sackett, 32 Mich. 97, 101. See 1839, Curling v. Curling, 38 Ky. (8 Dana) 38, 33 Am. Dec. 475; 1887, Raley v. Umatilla County, 15 Ore. 172, 13 Pac. 890, 3 Am. St. Rep. 142; 1875, Hathaway v. Sackett, 32 Mich. 97, 100.

[25] 1899, In re Royer's Estate, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, 369.

[26] 1902, State v. Toledo, 23 Ohio Cir. Ct. Rep. 327, 342.

[1] They may be so mentioned. See 1884, Leeds v. Shaw, 82 Ky. 79, 6 Ky. Law. Rep. 26.

[2] 1891, Davis v. Barnstable, 154 Mass. 224, 28 N. E. 165.

[3] 1916, Bolick v. Cox, 145 Ga. 888, 90 S. E. 54.

[4] 1896, In re John, 30 Ore. 494, 508, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

township. The condition is not irreconcilable with governing conditions. The school district may extend aid to those seeking facilities for higher education which are not otherwise provided.[5]

§ 320. **Public Libraries.** Closely connected with schools are libraries of all kinds. These may exist as a part of the school as is the case with university libraries, or their management may be independent of it. There can be no question but that a library is in line with the general purposes of even a school district.[6] Much more may the board of education of the city and county of New York,[7] or the boards of trustees for the common schools in the wards of the same city,[8] take such gifts for the establishment and maintenance of suitable libraries. Where land is conveyed to a city on express condition that it be forever held for the purpose of erecting and maintaining a public library building, the donee may accept another conveyance of land for the same purpose. It may in time need two libraries.[9] Cities[10] and towns[11] may also become trustees of gifts for library purposes. Even a board of water commissioners has been held capable of taking a bequest to establish a library of technical books of immediate practical utility to its employees.[12]

§ 321. **Public Parks.** Next to education by schools or libraries, the beautifying of cities by parks and their accessories has made the strongest appeal to charitable donors. Such a purpose is a public one and of the greatest importance to the welfare of millions of people. Parks in large cities are oases in deserts of brick, stone, iron and cement. They not only afford to the denizens of crowded quarters amusement of a clean and healthy character, but actually hold out to thousands of city-bound people their only opportunity of

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[5] 1919, In re John, 265 Pa. 311, 108 Atl. 593.

[6] 1877, Maynard v. Woodard, 36 Mich. 423.

[7] 1878, Betts v. Betts, 4 Abb. N. C. 317, 404 (N. Y.).

[8] 1878, Betts v. Betts, 4 Abb. N. C. 317, 409 (N. Y.).

[9] 1909, Keene v. Eastman, 75 N. H. 191, 72 Atl. 213.

[10] 1891, New Haven Young Men's Institute v. New Haven, 60 Conn. 32, 43, 22 Atl. 447; 1897, Beurhaus v. Watertown, 94 Wis. 617, 627, 69 N. W. 986.

[11] 1922, Clarion v. Central Savings Bank, 71 Colo. 482, 208 Pac. 251.

[12] 1889, Penny v. Croul, 76 Mich. 471, 479, 43 N. W. 649, 5 L. R. A. 858.

getting a glimpse of verdant nature. Gifts for parks[13] and commons[14] are, therefore, universally recognized as charitable. Municipalities may, therefore, become the owners of land not necessary for public buildings.[15]

§ 322. **Monuments in Parks.** This recognition extends to everything that makes parks attractive, though it be nothing more than an ornamental drinking fountain for horses.[16] A magnificent memorial to be erected in a park which will tend to elevate and refine the people, cultivate a love for the beautiful in art and architecture, and keep alive patriotism and the remembrance of the martial prowess, statesmanship and other good deeds of soldiers, public men and private citizens may, therefore, be made the purpose of a charitable gift.[17] The same is true of a building to be erected on the grounds of such a park,[18] and of an ornamental gate or arch of stone at some entrance to or at some suitable part of the civic center of a city.[19] "When one considers that civilized communities have in all ages adorned their ways and parks with memorials of the illustrious dead, it is idle to assert that columns and statuary have no proper place in them."[20]

§ 323. **Trees on Public Grounds.** The improvement need not be in direct connection with a park. Trees are beautiful and useful in parks, but are frequently even more beautiful and useful outside of their limits. Gifts for the purpose of setting out ornamental trees on the wayside or within certain schoolhouse grounds,[21] or in situations now exposing the people to the heat of the sun,[22] or for ornamenting and im-

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[13] 1891, Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; 1895, In re Bartlett, 163 Mass. 509, 514, 40 N. E. 899; 1911, Richardson v. Essex Institute, 208 Mass. 311, 318, 94 N. E. 262; 1911, Burr v. Boston, 208 Mass. 537, 539, 95 N. E. 208, 34 L. R. A. (N. S.) 143; 1914, Lackland v. Hadley, 260 Mo. 539, 564, 169 S. W. 275.

[14] 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 372, 77 Atl. 565; 1911, Burr v. Boston, 208 Mass. 537, 539, 95 N. E. 208, 34 L. R. A. (N. S.) 143.

[15] 1816, Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155.

[16] 1909, In re Graves, 242 Ill. 23, 28, 89 N. E. 672, 134 Am. St. Rep. 302, 24 L. R. A. (N. S.) 283; 1913, Hosmer v. Detroit, 175 Mich. 267, 278, 141 N. W. 657.

[17] 1896, In re Smith, 5 Pa. Dist. Rep. 327, 328 (affirmed 181 Pa. 109, 37 Atl. 114). See 1869, Gilmer v. Gilmer, 42 Ala. 9, 23.

[18] 1918, Lightfoot v. Poindexter, 199 S. W. 1152, 1165 (Tex. Civ. App.).

[19] 1917, Haggin v. International Trust Co., 69 Colo. 147, 169 Pac. 138, 140 (Colo.).

[20] 1918, Lawrence v. Prosser, 89 N. J. Eq. 248, 250, 104 Atl. 772.

[21] 1895, In re Bartlett, 163 Mass. 509, 516, 40 N. E. 899.

[22] 1858, Cresson's Appeal, 30 Pa. (6 Casey) 437, 450.

proving the grounds surrounding the waterworks of a city[1] have, therefore, received full recognition.

§ 324. **Public Poor Relief.** Another great public function is poor relief. While it has been held that a city has no power to accept a trust in favor of "deserving indigent persons not paupers";[2] while a bequest to a town in trust for the benefit of its poor not confined to the statutory poor has been held invalid as not sufficiently germane to the purposes of the town,[3] a gift to the city of St. Louis for the "relief of all poor emigrants and travelers coming to St. Louis on their way **bona fide** to settle in the West,"[4] has been upheld, and a city has been appointed by the Massachusetts court as the trustee of a charity established for the purpose of giving away, or supplying at low cost, coal to such of its citizens as are on the verge of becoming public charges.[5] Whatever, therefore, the limits of this power, there can be no question of its existence. Whether the gift be for the general class of the poor,[6] or for a special class such as the destitute women and children of a city,[7] the poor widows[8] or the poor[9] of a certain township, is immaterial. The gifts may also be for certain purposes such as the education of poor orphans,[10] and the purchase of school books and clothing for poor scholars,[11] and may be made for the benefit of some eleemosynary institution maintained by the state or one of its subdivisions, such as a poorhouse,[12] a hospital,[13] a school for orphans,[14] a home for worthy homeless people and orphan

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1 1889, Penny v. Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858.

2 1891, Dailey v. New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

3 1891, Fosdick v. Hempstead, 125 N. Y. 581, 592, 26 N. E. 801, 11 L. R. A. 715 (Reversing 55 Hun. 611, 8 N. Y. Supp. 772).

4 1860, Chambers v. St. Louis, 29 Mo. 543, 379.

5 1863, Webb v. Neal, 87 Mass. (5 Allen) 575.

6 1913, **In re** Rasquin, 144 N. Y. Supp. 988, 159 App. Div. 845; 1876, Lagrange County v. Rogers, 55 Ind. 297, 300.

7 1883, **In re** Robinson, 63 Cal. 620.

8 1876, Mason v. Tuckerton M. E. Church, 27 N. J. Eq. (12 C. E. Green) 47, 53.

9 1876, Lawrence County v. Leonard, 83 Pa. 206, 210, 34 Leg. Int. 104.

10 1902, Clayton v. Hallett, 30 Colo. 231, 253, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; 1876, Mason v. Tuckerton M. E. Church, **supra.**

11 1891, Rushmore v. Rushmore, 59 Hun. 615; 12 N. Y. Supp. 776, 35 N. Y. St. Rep. 845.

12 1897, Beurhaus v. Watertown, 94 Wis. 617, 627, 69 N. W. 986.

13 1913, Dykeman v. Jenkines, 179 Ind. 549, 559, 101 N. E. 1013, Ann. Cas. 1915 D. 1011.

14 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 190, 11 L. Ed. 205.

boys,[15] and an institution for the maintenance of the indigent blind and lame.[16] It has, therefore, been said that the state has power "to accept a gift in trust, to apply the income thereof toward the maintenance of some institution for the care and relief of idiots."[17]

§ 325. **Miscellaneous Examples.** Municipal charitable purposes extend to other related subjects. A public burying ground is just as much for the corporate or public purposes of a municipal corporation as are the grounds for a street or park,[18] and is, therefore, recognized as a charity.[19] The maintenance of the Valley Forge property for all times to come as a public memorial of the great struggle which gave birth to our nation is in the same class.[20] A gift such as that made by Benjamin Franklin to the cities of Boston and Philadelphia to be laid out in certain enumerated public works,[21] or in court houses,[1] town halls,[2] highways and bridges,[3] soldiers' home,[4] national guard armories,[5] or any other similar building,[6] a fire company under the control of

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[15] 1894, Rush County v. Dinwiddie, 139 Ind. 128, 133, 37 N. E. 795.

[16] 1831, Philadelphia v. Elliott, 3 Rawle 170 (Pa.).

[17] 1896, In re Yale College, 67 Conn. 237, 245, 34 Atl. 1036.

[18] 1912, Ritter v. Couch, 71 W. Va. 221, 232, 76 S. E. 428.

[19] 1910, Chapman v. Newell, 146 Iowa 415, 419, 125 N. W. 324; 1914, Collector of Taxes v. Oldfield, 219 Mass. 374, 106 N. E. 1014; 1911, Stewart v. Coshow, 238 Mo. 662, 142 S. W. 283; 1895, Sheldon v. Stockbridge, 67 Vt. 299, 302, 31 Atl. 414.

[20] 1912, In re Centennial and Memorial Ass'n of Valley Forge, 235 Pa. 206, 213, 83 Atl. 683.

[21] 1893, Franklin v. Philadelphia, 2 Pa. Dist. Rep. 435, 439, 13 Pa. Co. Ct. Rep. 241; 1903, Boston v. Doyle, 184 Mass. 373, 380, 68 N. E. 851.

[1] 1896, Stuart v. Easton, 74 Fed. 854, 859, 21 C. C. A. 146, 39 U. S. App. 238 (affirmed 170 U. S. 383, 42 L. Ed. 1078, 18 S. C. 650).

[2] 1823, Coggeshall v. Pelton, 7 Johns. Ch. 292, 11 Am. Dec. 471 (N. Y.).

[3] 1856, Hamden v. Rice, 24 Conn. 350, 354.

[4] 1913, Overholser v. National Home, 68 Ohio St. 236, 67 N. E. 487, 62 L. R. A. 926, 96 Am. St. Rep. 658; 1921, Lehnherr v. Feldman, 110 Kans. 115, 202 Pac. 624.

[5] 1895, Philadelphia v. Keystone Battery, 169 Pa. 526, 32 Atl. 428. The maintenance of a volunteer military organization has the object of furthering the general welfare by the preservation of peace and order, by the repression of domestic and internal violence, and by the defense of the state and nation against invasion by foreign foes and for this reason is a public charity. 1885, Scranton City Guard Ass'n v. Scranton, 2 C. P. Rep. 217, 1 Pa. Co. Ct. Rep. 550.

[6] 1919, New Jersey Title Guaranty and Trust Co. v. Smith, 90 N. J. Eq. 386, 108 Atl. 16.

the village authorities,[7] a national[8] or municipal[9] theater, even for the support of a minister while that was still a public burden,[10] or more generally for the payments of the expenses of a town,[11] or the debt of a state,[12] or of the United States,[13] or for the use and benefit of a town in such manner as the trustees shall determine[14] have, therefore, received full recognition. The same is true of a tuberculosis hospital conducted by a city and maintained by taxation.[15]

§ 326. **Summary.** The field of charity is not exhausted by charities conducted by individuals or private corporations, but extends to charities (whether they are of an educational or eleemosynary character) taken over and conducted by the state or one of its public agencies. Public schools and libraries vividly call to mind the educational charities in which the state is now supreme, while public hospitals and poorhouses on the one hand and public parks and driveways on the other illustrate the charities of an eleemosynary character which are conducted at public expense. In addition to these standardized subjects of municipal charities, there are others such as the erection and maintenance of public buildings, public memorials, and national guard armories, or the payment of the expenses of a town or of the debt of a state or the United States which are in the same class.

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[7] 1921, Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613, 614.

[8] 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 950.

[9] 1923, Nixon v. Brown, —— Nev. ——, 214 Pac. 524, 531.

[10] 1856, Brown v. Concord, 33 N. H. 285; 1921, Petition of Tuttle, 80 N. H. 36, 114 Atl. 867.

[11] 1914, Collector of Taxes v. Oldfield, 219 Mass. 374, 106 N. E. 1014; 1879, Brown v. Brown, 7 Ore. 285, 297.

[12] 1910, Girard Trust Company v. Russell, 179 Fed. 446, 450, 453, 454, 102 C. C. A. 592 (Affirming 171 Fed. 161).

[13] 1878, Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230. A testator of a somewhat extraordinary bend of mind is said to have had about $90,000 of legal tender notes destroyed as a gift to the United States. 1 Green Bag 183. **Contra.** 1872, **In re** Fox, 52 N. Y. 530, 11 Am. Rep. 751 (affirmed 1876, United States v. Fox, 94 U. S. 315, 24 L. Ed. 192).

[14] 1920, Peirce v. Attwill, 234 Mass. 389, 125 N. E. 609.

[15] 1920, **In re** Wilson, 111 Wash. 491, 191 Pac. 615.

CHAPTER IX

DEFINITENESS

§ 337. **Conflict. Difficulties.** Since the cases in the United States are not harmonious on the question of the extent or source of the power of courts over charitable trusts, the question of the definiteness necessary in charitable trusts is not an inviting one to the superficial investigator.[1] The solution of questions respecting the validity of such trusts has usually been fraught with difficulty and has resulted in the expression of a contrariety of opinion and a conflict in the authorities.[2] Though such conflict is largely in reference to the application of the principles, not in reference to the principles themselves,[3] yet the authorities cannot be reconciled, and all that can be done is to classify them according to states.[4] A "wilderness of cases"[5] exists emanating from all grades of courts from the highest to the lowest, in both England and America,[6] which repels all but the most persistent inquirer. This conflict is occasioned by a difference of opinion as to the correct doctrine of charitable trusts at the common law and is influenced by statutory provisions.[7] A conflict certainly is to be expected on a question involving state policy.[8] There is, therefore, no subject concerning which there is a greater diversity of decisions in the different states than the certainty and definiteness required in the beneficiaries and objects of a charity. The radical differences in the views of the courts have been produced, to some extent, by statutory provisions, and largely by the question

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[1] 1865, German Land Association v. Scholler, 10 Minn. 331, 340, Gil. 260.

[2] 1906, Inglish v. Johnson, 42 Tex. Civ. App. 118, 122, 95 S. W. 558.

[3] 1869, Miller v. Atkinson, 63 N. C. 537, 539; 1879, Dodge v. Williams, 46 Wis. 70, 99, 50 N. W. 1103, 1 N. W. 92; 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. (3 Pickle) 668, 11 S. W. 825, 4 L. R. A. 699.

[4] 1902, Clayton v. Hallett, 30 Colo. 231, 246, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117.

[5] 1876, American Tract Society v. Atwater, 30 Ohio St. 77, 84, 27 Am. Rep. 422.

[6] 1884, Coit v. Comstock, 51 Conn. 352, 377, 50 Am. Rep. 29.

[7] 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 801, 84 N. W. 273, 83 Am. St. Rep. 553.

[8] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed) 305, 343.

whether the statute of 43 Elizabeth has been recognized or adopted as the law of the state. In some states the statute is not recognized as a part of the law, and in others, by special statute, all trusts, except those specifically enumerated, have been abolished, and in those states, objects and beneficiaries must be described with great certainty.[9] In treating of the certainty required of charitable trusts, a sharp distinction must, therefore, be made between cases arising in those states which have or had abolished the English charity doctrine, which states include Virginia, West Virginia and Maryland on the one hand and New York, Michigan, Wisconsin and Minnesota on the other,[10] and cases arising in the other states, though it should not be overlooked that even in the latter states variations still exist in regard to the element of certainty required of a charitable trust.[11]

§ 338. **Minority Rule.** A private trust must be certain not only in regard to the property subject to it, but also in regard to its beneficiaries. The beneficiaries are the principal persons in any trust relation. If courts, where a private trust is involved, are unable to determine who they are, such trust will not be enforced. In charitable trusts, however, the beneficiaries are necessarily uncertain. A trust which confers a legal right of enforcement on its beneficiaries **ipso facto** ceases to be a charitable one. It is this indefiniteness of beneficiaries of charitable trusts that has been the stumbling-block in those states in which the English charity doctrine has or had been abolished. Hence, gifts to unincorporated societies,[12] indefinite classes of beneficiaries direct[13] or to individuals in trust for certain charitable pur-

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[9] 1907, Welch v. Caldwell, 226 Ill. 488, 496, 80 N. E. 1014.

[10] See Chapter 2, Sections 35 to 67.

[11] 1887, Hunt v. Fowler, 121 Ill. 269, 275, 12 N. E. 331.

[12] 1829, Murphy v. Dallam, 1 Bland 529 (Md.); 1867, State v. Warren, 28 Md. 338, 353; 1881, Church Extension M. E. Church v. Smith, 56 Md. 362, 397; 1882, Rizer v. Perry, 58 Md. 112, 116; 1897, Pack v. Shanklin, 43 W. Va. 304, 27 S. E. 389; 1850, Meade v. Beale, Fed. Car. No. 9,371, Taney 339, 2 Cas. Law. Repos. 329; 1819, Philadelphia Baptist Association v. Hart, 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499.

[13] 1819, Trippe v. Frazier, 4 Har. and J. 446, 447 (Md.); 1892, Society of Most Precious Blood v. Moll, 51 Minn. 277, 53 N. W. 648; 1897, Pratt v. Roman Catholic Orphan Asylum, 46 N. Y. Supp. 1035, 20 App. Div. 352 (affirmed 166 N. Y. 593, 59 N. E. 1120); 1876, Heiss v. Murphey, 40 Wis. 276, 290.

poses, such as the propagation of the gospel in foreign lands,[14] its preaching in the destitute regions of the west,[15] the offering of prayers in a certain church,[16] the upkeep of services in a certain chapel,[17] the building of a church and the support of its minister,[18] the extension of the kingdom of God in a certain church,[19] the schooling of poor children in a certain district,[20] the education of free colored persons in a certain city,[21] or of Catholic priests in a certain diocese,[1] the building of a library,[2] the support of poor children of certain congregations,[3] or of one or more worthy and moral persons of the age of sixty years and upward,[4] the carrying on of the work of relieving suffering,[5] the repair and beautification of a certain cemetery,[6] or generally for the benefit of white and colored children,[7] have been held to be void for indefiniteness. The same fate has overtaken gifts to corporations, private[8] or public,[9] for purposes beyond their corporate powers.

§ 339. **Charitable Corporations.** The courts, which have rendered the decisions just referred to, do not, however, exclude charities from their respective states but only limit their sphere of operation. Where the property and the trust, the beneficiary and the managers, are all definite, the gift, though coming within the range of charities, is not one which requires any consideration of the English doctrine applicable

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[14] 1869, Carpenter v. Miller, 3 W. Va. 174, 180, 100 Am. Dec. 744.

[15] 1862, Goddard v. Pomeroy, 36 Barb. 546, 555 (N. Y.).

[16] 1888, Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, 20 Abb. N. C. 447.

[17] 1895, Butler v. Parochial Fund, 36 N. Y. Supp. 562, 92 Hun. 96, 71 N. Y. St. Rep. 758.

[18] 1859, Seaburn v. Seaburn, 56 Va. (15 Grat.) 423.

[19] 1920, In re Ford, 144 Minn. 454, 175 N. W. 913.

[20] 1833, Janey v. Latane, 31 Va. (4 Leigh) 327.

[21] 1870, Needles v. Martin, 33 Md. 609, 618.

[1] 1903, Shanahan v. Kelly, 88 Minn. 202, 206, 92 N. W. 948.

[2] 1889, Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145.

[3] 1822, Dashiell v. Attorney General, 5 Har. and J. 392, 399, 9 Am. Dec. 572, s. c. 6 Har. and J. 1 (Md.).

[4] 1849, Ayers v. M. E. Church, 5 N. Y. Super. Ct. (3 Sandf.) 351, 8 N. Y. Leg. Obs. 17.

[5] 1910, Stoepel v. Satterthwaite, 162 Mich. 457, 127 N. W. 673.

[6] 1876, Knox v. Knox, 9 W. Va. 124, 150.

[7] 1882, Henry Watson Children's Aid Society v. Johnson, 58 Md. 139.

[8] 1877, In re Abbott, 3 Redf. Sur. 303 (N. Y.); 1866, Foote v. Sharpley, cited 3 Redf. 306 (N. Y.).

[9] 1855, Wilderman v. Baltimore, 8 Md. 551.

to imperfectly defined gifts and trusts.[10] Such, in legal contemplation, is the case where the gift is made to a charitable corporation. "Gifts to religious and charitable corporations, to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest, or the income of a bequest to be invested in perpetuity, do not create a trust in any legal sense, do not offend against the statutes of perpetuities, are not to be judged by any of the well-known rules pertaining to the law of trusts as applied to private individuals."[11] A charitable bequest to a corporation which is within the powers of such corporation is, therefore, not void on account of any indefiniteness of the beneficiaries.[12] In such a donation the gift itself is certain, the corporation is thoroughly identified, and the use, falling within the purposes of its creation, is distinctly defined.[13] There is no doubt that, where the beneficiaries of the use for which a trust was created was a corporation, the court of chancery had jurisdiction prior to the statute of Elizabeth to enforce the use upon an original bill in the name of the corporation, and to this extent certainly the courts had inherent jurisdiction over charitable uses prior to and independent of the statute of Elizabeth.[14] Where a corporation is created for certain charitable purposes, there is every reason why it should be able to hold and administer a gift for such purposes, and none why it should not be able to do so.[15] "Where a devise is made to a society or organization founded for and engaged in a specific work without setting out in the will a different use to which the devise is to be applied, the mere devise sufficiently indicates the purpose intended, and may be enforced in equity."[16] There is every reason why the legislature should give aid to charitable trusts by charters which do not interfere with the just and equitable

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[10] 1877, Maynard v. Woodard, 36 Mich. 423, 426.

[11] 1894, Bird v. Merklee, 144 N. Y. 544, 550, 39 N. E. 645, 27 L. R. A. 423.

[12] 1914, Osenton v. Elliott, 73 W. Va. 519, 525, 81 S. E. 837.

[13] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 761.

[14] 1856, Owens v. Missionary Society, 14 N. Y. (4 Kern) 380, 398, 67 Am. Dec. 160.

[15] 1885, Protestant Episcopal Education Society v. Churchman, 80 Va. 718, 761.

[16] 1923, American Christian Mission Society v. Tate, —— Ky. ——, 250 S. W. 483.

rights of individuals.[17] In the constitution of such a body the law does not require that the ultimate recipients of the bounty be minutely and precisely identified. On the contrary, a certain amount of indefiniteness is of its very essence.[18] It is, therefore, not against public policy to allow gifts to charitable, benevolent, scientific, or educational corporations. Such gifts are encouraged and the donors are commended as benefactors. Such institutions, dotted all over our land to succor, elevate and educate men and ameliorate their condition are distinguishing features of our modern civilization.[19] The fact that such a corporation must obey the orders of the unincorporated and fluctuating multitude for whose use it is created, or the orders of certain committees, or even of stockholders,[20] does not affect the validity of a gift to them. Even though it were forbidden to expend a dollar without asking the directions of a mass meeting of such multitude, it could nevertheless take such a gift. It is not a mere conduit pipe through which the money flows into the hands of the ultimate beneficiaries.[21] Of course, a corporation founded for charitable purposes may, in its activities, so depart from its charitable character as to cease to be a charitable institution in the legal sense.[22]

§ 340. **Gift to Corporation. Perpetuity.** An objection frequently raised against charitable gifts is eliminated where they are made to charitable corporations. Such artificial entities are exempted by implication from the statutes against perpetuities.[23] Their charters in effect are a repeal **pro tanto** of such statutes.[1] A gift within the corporate purposes of the corporation-donee cannot be declared to be in conflict with the rule against perpetuities,[2] since it is abso-

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[17] 1815, Bartlet v. King, 12 Mass. 536, 544, 7 Am. Dec. 99.

[18] 1904, Smith v. Havens Relief Fund Society, 90 N. Y. Supp. 168, 175, 44 Misc. Rep. 594.

[19] 1884, Hollis v. Drew Theological Seminary, 95 N. Y. 166, 172, 173.

[20] 1923, Weme v. First Church of Christ Scientist, —— Ore. ——, 219 Pac. 618.

[21] 1867, Harris v. American Bible Society, 2 Abb. Dec. 316, 4 Abb. Prac. (N. S.) 421, 4 Trans. App. 485, 497.

[22] 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 372, 204 App. Div. 664.

[23] 1889, Cottman v. Grace, 112 N. Y. 299, 307, 19 N. E. 839, 3 L. R. A. 145.

[1] 1901, Matter of Griffin, 167 N. Y. 71, 78, 60 N. E. 284.

[2] 1909, Baltzell v. Church Home and Infirmary, 110 Md. 244, 270, 73 Atl. 151.

lute and not upon any technical trust.[3] It follows that a bequest to an incorporated seminary for the purpose of endowing a professorship,[4] or to a church corporation for the support of its ministers[5] is valid and not in conflict with the statute against perpetuities.

§ 341. **Gift to Charitable Corporations within their Powers.** There is one important qualification to what has been said. The purposes of the gift must be within the powers of the corporation. Provided that this is the case, the gift will be valid whether it is absolute in form[6] or is made to trustees for the corporation.[7] It need not, however, be absolute in form. It will be absolute in fact though the donor provides that it is to be applied to the purposes of the corporation,[8] or though he limits it to the precise use for which it is incorporated,[9] or to a part of such use.[10] A gift may even in terms be made "in trust" for some of the corporate purposes of the donee without affecting its validity. A benefactor may apply his bounty to the whole, or any one or more of the various purposes for which the corporation donee is authorized to hold property,[11] without creating a technical trust relation. Where a testator leaves property to a charitable corporation for certain of its corporate purposes, it would be like making a person a trustee for himself to declare such a use to be a trust.[12] A gift to a hospital corporation is, therefore, absolute, though it is stated to be

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[3] 1904, Smith v. Haven Relief Fund Society, 90 N. Y. Supp. 168, 178, 44 Misc. Rep. 594; 1907, Fralick v. Lyford, 95 N. Y. Supp. 433, 107 App. Div. 543 (affirmed 187 N. Y. 524, 79 N. E. 1105).

[4] 1857, Theological Seminary of Auburn v. Kellogg, 16 N. Y. (2 Smith) 83, 89.

[5] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525.

[6] 1881, Church Extension M. E. Church v. Smith, 56 Md. 362, 391; 1874, Roy v. Rowzie, 66 Va. (25 Grat.) 599, 610; 1879, Missionary Society of M. E. Church v. Calvert, 73 Va. (32 Grat.) 357, 365; Cozart v. Manderville, 73 Va. (32 Grat.) 365; 1886, Wilson v. Perry, 29 W. Va. 169, 198, 1 S. E. 302; 1876, Ruth v. Oberbrunner, 40 Wis. 238, 265.

[7] 1886, Crisp v. Crisp, 65 Md. 422, 428, 5 Atl. 421.

[8] 1908, Ege v. Hering, 108 Md. 391, 418, 70 Atl. 221.

[9] 1889, In re Look, 54 Hun. 635, 7 N. Y. Supp. 298, 26 N. Y. St. Rep. 745, 4 Silvernail 233 (Affirmed 125 N. Y. 762, 27 N. E. 408).

[10] 1915, St. George Church v. Morgan, 152 N. Y. Supp. 497, 88 Misc. 702; 1898, Congregational Unitarian Society v. Hale, 51 N. Y. Supp. 704, 708, 29 App. Div. 396, 27 Civ. Proc. Rep. 303; 1923, In re Hart's Will, 200 N. Y. Supp. 63, 205 App. Div. 703.

[11] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 535.

[12] 1909, Baltzell v. Church Home and Infirmary, 110 Md. 244, 274, 73 Atl. 151.

"for the benefit and use of the blessed Virgin Mary purgatorial fund of said hospital."[13] The mere fact that a gift is directed to be kept as a separate fund, and its income only is to be used for a corporate purpose, does not make the gift invalid.[14] "The corporation uses the property, in accordance with the law of its creation, for its own purposes; and the dictation of the manner of its use, within the law by the donor, does not affect its ownership or make it a trustee."[15] A gift to a corporation may, therefore, validly be made for one of its corporate purposes only,[16] or may be devoted to carrying out a part of such purposes,[17] and such a donation will be regarded not as made in trust, but as made on condition that it be applied to the corporate uses specified,[18] and will be valid even in Virginia though the corporate donee is excepted from the statutory exception made to the Virginia charity doctrine.[19]

§ 342. **Illustration of Valid Gifts to Corporations.** It will not be difficult to illustrate what has just been said. Gifts to church corporations for their Sunday schools,[20] parish schools,[1] colleges for boys,[2] church libraries,[3] the support of their pastors,[4] the repair of their churches,[5] the cause of home and foreign missions,[6] the support and education of

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[13] 1907, Johnson v. Hughes, 187 N. Y. 446, 80 N. E. 373.

[14] 1922, National Board of Christian Women's Board v. Fry, —— Mo. ——, 239 S. W. 519; 1909, Baltzell v. Church Home and Infirmary, 110 Md. 244, 269, 73 Atl. 151; 1923, In re Donchian's Estate, 199 N. Y. Supp. 107, 120 Misc. 535.

[15] 1873, Wetmore v. Parker, 52 N. Y. 450, 459 (Affirming 7 Lans. 121).

[16] 1899, In re Bogart, 60 N. Y. Supp. 496, 43 App. Div. 582; 1871, Rainey v. Laing, 58 Barb. 453 (N. Y.); 1903, Shanahan v. Kelly, 88 Minn. 202, 209, 92 N. W. 948.

[17] 1872, Wetmore v. Parker, 7 Lans. 121, 126 (Affirmed 52 N. Y. 450); 1892, Atwater v. Russell, 49 Minn. 57, 82, 83, 51 N. W. 629, 52 N. W. 36.

[18] 1911, Snowden v. Crown Cork and Seal Co., 114 Md. 650, 655, 656, 80 Atl. 510, Ann. Cas.; 1912, A. 679; 1916, Connor v. Trinity Reformed Church, 129 Md. 360, 363, 99 Atl. 547.

[19] 1874, Roy v. Rowzie, 66 Va. 599, 611.

[20] 1887, Eutaw Place Baptist Church v. Shively, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412; 1828, In re Howe, 1 Paige 214 (N. Y.).

[1] 1894, Hanson v. Little Sisters of the Poor, 79 Md. 434, 437, 32 Atl. 1052, 32 L. R. A. 293.

[2] 1892, Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 285, 23 Atl. 781.

[3] 1828, In re Howe, 1 Paige 214 (N. Y.).

[4] 1900, Trinity M. E. Church South v. Baker, 91 Md. 539, 566, 46 Atl. 1020; 1892, Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 283, 23 Atl. 781.

[5] 1892, Halsey v. Convention of Protestant Episcopal Church, supra.

[6] 1897, Lane v. Eaton, 69 Minn. 141, 146, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559.

pious, indigent young men preparing for the ministry,[7] the benefit of at least seven clergymen officiating as rectors of parishes in the diocese of New York whose salaries are less than $500,[8] and for the relief of their poor members,[9] have been sustained by the courts. Devises and bequests to educational institutions for their female department,[10] for a professorship,[11] or a theological seminary,[12] for the support of students studying with a view to the Christian ministry,[13] for the aid of deserving and promising young women,[14] for the free tuition of the daughters of officers, soldiers, marines or seamen who have died in the United States service during the Civil War,[15] similarly have been upheld. Nor are gifts to eleemosynary corporations in a different class. Gifts to a home to aid poor, respectable sewing-girls or apprentices,[16] to an infirmary to endow a bed,[17] to a cemetery to keep the donor's grave in condition,[18] or to assist in building a chapel on its grounds,[19] to a mission society for its India Mission,[20] or for the purpose of educating six girls in India as bible readers,[1] or to a monthly meeting for the benefit of one of its schools,[2] have been sustained by the courts.

§ 343. **Purposes beyond Corporate Powers.** The purposes just enumerated were all within the powers of the cor-

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[7] 1871, Rainey v. Laing, 58 Barb. 453 (N. Y.).

[8] 1880, Graham v. Alden, 20 Abb. N. C. 477 (N. Y.).

[9] 1894, Bird v. Merklee, 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423.

[10] 1871, Adams v. Perry, 43 N. Y. 487; 1907, In re Durand, 107 N. Y. Supp. 393, 56 Misc. Rep. 235 (Affirmed 111 N. Y. Supp. 1118, 127 App. Div. 945).

[11] 1857, Theological Seminary of Auburn v. Kellogg, 16 N. Y. (2 Smith) 83.

[12] 1891, In re Teed, 59 Hun. 63, 12 N. Y. Supp. 642, 645, 35 N. Y. St. Rep. 531.

[13] 1878, Kerr v. Dougherty, 59 How. Prac. 44, 52 (Affirmed 79 N. Y. 327).

[14] 1900, Trinity Methodist Episcopal Church South v. Baker, 91 Md. 539, 575, 46 Atl. 1020.

[15] 1871, Adams v. Perry, 43 N. Y. 487, 495.

[16] 1909, Baltzell v. Church Home and Infirmary, 110 Md. 244, 274, 73 Atl. 151.

[17] 1908, Ege v. Hering, 108 Md. 391, 418, 70 Atl. 221.

[18] 1900, In re Woods, 67 N. Y. Supp. 1123, 33 Misc. Rep. 13. (Affirmed 61 App. Div. 587, 70 N. Y. Supp. 933.)

[19] 1886, Webster v. Morris, 66 Wis. 366, 380, 28 N. W. 353, 57 Am. Rep. 278.

[20] 1879, Missionary Society of M. E. Church v. Calvert, 73 Va. (32 Grat.) 357, 365.

[1] 1901, Woman's Foreign Missionary Society v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711.

[2] 1901, Erhardt v. Baltimore Monthly Meeting, 93 Md. 669, 49 Atl. 561. See 1901, Matter of Griffin, 167 N. Y. 71, 60 N. E. 284.

porations to which the gifts in question were made, though they were not coextensive with them. This leaves the question whether such corporations in such states can take gifts which go beyond the powers conferred upon them. This question must be answered in the negative. Corporations cannot be made trustees for such purposes. All the objections raised against such gifts where an individual acts as trustee would apply to the corporations. Their purposes would not be defined by the statutes and would, therefore, fail for indefiniteness.[3] This will sometimes force the courts minutely to examine the charters of such corporations and uphold or cast down the gift according to the result of this investigation. A statute authorizing church corporations to purchase and hold land for their own use "or other pious uses" has, therefore, been construed as not authorizing such corporations to hold lands to any use, however foreign to the purposes which religion or charity might sanction.[4]

§ 344. **Liberal Rule of Construction.** The liberal rule of construction, which is so prominent a feature in states which retain the English charity doctrine, is by no means unknown to the states which have abolished such doctrine. It takes on a somewhat different shape, however. Great efforts will be made to discover a corporation capable of taking the gift in question. A society, which for nearly twenty years has exercised the functions and claimed the powers of a church corporation, will be held to be capable of taking a bequest as a **de facto** corporation.[5] A charitable body will be held to be sufficiently organized to take a gift though the certificate filed by it is defective.[6] Gifts to a consistory of an incorporated church,[7] to the trustees of an incorporated

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[3] 1893, Yingling v. Miller, 77 Md. 104, 26 Atl. 491; 1900, Trinity M. E. Church South v. Baker, 91 Md. 539, 46 Atl. 1020; 1849, Ayers v. M. E. Church, 5 N. Y. Super. Ct. (3 Sandf.) 351, 8 N. Y. Leg. Obs. 17; 1850, Andrew v. New York Bible and Prayer Book Society, 6 N. Y. Super. Ct. (4 Sandf.) 156, 187 (Reversed 8 N. Y. (4 Seld.) 559, Seld. Notes 192); 1862, Goddard v. Pomeroy, 36 Barb. 546, 554 (N. Y.).

[4] 1849, Tucker v. St. Clement's Church, 5 N. Y. Super. Ct. (3 Sandf.) 242 (Affirmed 8 N. Y. 558, Seld. Notes 191).

[5] 1853, Chittenden v. Chittenden, 1 Am. Law. Reg. (O. S.) 538 (N. Y.).

[6] 1878, Betts v. Betts, 4 Abb. N. C. 317, 392 (N. Y.).

[7] 1867, Reformed Dutch Church v. Brandow, 52 Barb. 228 (N. Y.).

Masonic lodge,[8] to the board of an incorporated college,[9] to the treasurer of an incorporated foundling asylum,[10] have been upheld as being given to the corporation and not to the individuals. A gift to the American Colonization Company in the city of New York has been construed as being intended for the national body of that name, a Maryland corporation, and not for its unincorporated New York branch.[11] Similarly, a bequest to the "Newsboy Lodging House," an unincorporated adjunct of an incorporated "Children's Aid Society," has been held to have been intended for the corporation.[12] A deposit in a savings bank as follows: "Almira Clark, in trust for Benevolent Object, Warburton Avenue, Savings Bank," has been construed as an absolute gift to the Warburton Avenue church (a corporation).[13] Under a bequest "to the Methodist Society that meets in the meeting house in John Street," the corporation of which such society was an adjunct, has been allowed to take for such society.[14] Other examples of the same construction could readily be enumerated.[15]

§ 345. **Corporation not in esse.** It will not be necessary that the corporation donee be actually in existence at the time when the gift takes effect. An ancient method of founding a charity is to devise property to a corporation and then procure the incorporation of such donee.[16] A gift may, therefore, be made by way of conditional limitation to trustees for a charitable corporation yet to be formed.[17] A trust fund may be created and placed in their hands to be paid to some charitable institution not yet in being, but whose existence

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[8] 1882, Iseman v. Myers, 26 Hun. 651 (N. Y.).

[9] 1878, Currin v. Fanning, 13 Hun. 458, 467 (N. Y.).

[10] 1882, Effray v. Foundling Asylum, 5 Redf. Sur. 557 (N. Y.).

[11] 1888, American Bible Society v. American Colonization Society, 50 Hun. 194, 2 N. Y. Supp. 774, 19 N. Y. St. Rep. 216.

[12] 1886, In re Hallgarten, 40 Hun. 542, 2 N. Y. St. Rep. 82.

[13] 1913, Warburton Ave. Baptist Church v. Clark, 142 N. Y. Supp. 1089, 158 App. Div. 230.

[14] 1839, Wright v. M. E. Church, 1 Hoff. Ch. 202, 238 (N. Y.). But see 1878, Kerr v. Dougherty, 59 How. Prac. 44, 60. (Affirmed 79 N. Y. 327.)

[15] 1844, Hornbeck v. American Bible Society, 2 Sandf. Ch. 133 (N. Y.); 1899, Hull v. Pearson, 55 N. Y. Supp. 324, 36 App. Div. 224; 1896, In re Isbell, 1 App. Div. 158, 37 N. Y. Supp. 919, 73 N. Y. St. Rep. 22.

[16] 1895, Webster v. Wiggin, 19 R. I. 73, 91, 31 Atl. 824, 28 L. R. A. 510.

[17] 1877, Ould v. Washington Hospital, 95 U. S. 303, 312, 24 L. Ed. 450 (Affirming 1 MacArthur 541, 29 Am. Rep. 605).

is provided for and looked forward to by the terms of the will.[18] "In determining the legality of the gift, there is no distinction between a natural person thereafter to be born and an artificial person thereafter to be organized."[19] The beneficiary corporation need, therefore, not necessarily be **in esse** in grants to charitable uses.[20] Of course, the corporation to be organized must be consistent with the express provisions of the will in order to be entitled to take.[21] If it is consistent with such directions "the estate remains in the patentee until the contingency happens, and then vests, if accepted."[1]

§ 346. **Illustrations.** The donor need not personally procure the incorporation of the donee. "There is no reason why property cannot be given to a corporation to be formed after the death of the testator and within the restricted period any more than there is why property should not be given to descendants or other persons thereafter to be born."[2] The fact that the institution contemplated has no legal existence at the time of the testator's death is, therefore, immaterial where it is but the means by which his intentions are to be carried into effect,[3] and where its coming into life is possible and must happen within the period allowed by the law for the vesting of future estates.[4] The incorporation avoids all the difficulties that were in the way and carries the charitable intentions of the testator into effect.[5] A person may, therefore, by will devise and bequeath property to a corporation to be formed after his death, provided that his directions as to its formation are not in conflict with the rule against perpetuities.[6] Such a gift may even be valid

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[18] 1922, **In re** Secrest Estate, —— Neb. ——, 191 N. W. 663.

[19] 1907, St. John v. Andrew Institute, 191 N. Y. 254, 267, 268, 83 N. E. 981 (affirmed 1909, Smithsonian Institution v. St. John, 214 U. S. 19, 52 L. Ed. 892, 29 S. Ct. 601).

[20] 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 370; s. c. 4 Iowa 252; 1821, Shapleigh v. Pillsbury, 1 Me. (1 Greenl.) 271, 281; 1879, Dodge v. Williams, 46 Wis. 70, 101, 50 N. W. 1103, 1 N. W. 92.

[21] 1891, People v. Simonson, 126 N. Y. 299, 27 N. E. 380.

[1] 1812, Rice v. Osgood, 9 Mass. 38, 44.

[2] 1907, St. John v. Andrews Institute, 191 N. Y. 254, 267, 83 N. E. 981 (affirmed 1909, Smithsonian Institution v. St. John, supra).

[3] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed.) 305, 348.

[4] 1891, People v. Simonson, 126 N. Y. 299, 306, 307, 27 N. E. 380.

[5] 1839, Literary Fund v. Dawson, 37 Va. (10 Leigh) 147, 153; s. c. 40 Va. (1 Rob.) 402.

[6] 1891, Tilden v. Green, 130 N. Y. 29, 47, 28 N. E. 880, 29 N. E.

though there is no express limitation of time, the necessary delay in the incorporation of the donee being considered merely as an incident to a certain result,[7] and creates an executory devise to such corporation,[8] which becomes effective when such provision is complied with in time by procuring the due incorporation of the donee.[9] It follows that a bequest to a proposed corporation for the maintenance of a hospital forever,[10] a deed to a certain synod as soon as it shall become incorporated, is valid and enforcible.[11] Of course, where discretion is vested in the trustees as to whether or not a corporation is to be organized and whether or not it is to take anything, and, if so, how much, no valid executory devise is created,[12] provided that the corporation is capable of being formed under the existing laws.[13] If this is the case, the legislature may enlarge its capacity to take, if such action becomes necessary.[14]

§ 347. **Incorporation after Completion of Gift.** It sometimes happens that a future estate is given to an unincorporated charitable society which speedily incorporates after the will has become effective. The situation is clear in such cases. Where a fund is created by a will to be enjoyed by such a society on the happening of a future event, the estate does not vest until that time and the society may take where it has become a corporation after the death of the testator, but before the vesting of such estate.[15] Similarly, it has been

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1033, 14 L. R. A. 33, 27 Am. St. Rep. 487; 1907, St. John v. Andrews Institute, 191 N. Y. 254, 267, 83 N. E. 981 (affirmed 1909, Smithsonian Institution v. St. John, 214 U. S. 19, 52 L. Ed. 892, 29 S. Ct. 601).

[7] 1891, People v. Simonson, 126 N. Y. 299, 308, 27 N. E. 380. Thus a delay of seven years in organizing the beneficiary has been held not to have been unreasonable under conditions such as existed in 1856 in Iowa. 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 377, s. c. 4 Iowa 252.

[8] 1904, Watkins v. Bigelow, 93 Minn. 210, 224, 100 N. W. 1104. Followed 1907, Appleby v. Appleby, 100 Minn. 408, 431, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. Rep. 709.

[9] 1874, Kinnaird v. Miller, 66 Va. (25 Grat.) 107, 120.

[10] 1917, In re Brown, 198 Mich. 544, 165 N. W. 929.

[11] 1900, Kahle v. Evangelical Lutheran Joint Synod, 81 Minn. 7, 83 N. W. 460.

[12] 1891, Tilden v. Green, supra.

[13] 1908, Tavshanjian v. Abbott, 112 N. Y. Supp. 583, 59 Misc. 642 (Modified 115 N. Y. Supp. 938, 130 App. Div. 863).

[14] 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 527, 67 C. C. A. 393.

[15] 1885, Shipman v. Rollins, 98 N. Y. 311, 327, 15 Abb. N. C. 288; 1885, Jones v. M. E. Sunday School, 4 Dem. Sur. 271 (N. Y.); 1890, Plymouth Society of Milford

held in a Colorado case that where an educational charitable gift to a city is by way of an executory devise, and the city was at the time of the testator's death not authorized to take the gift, it may acquire capacity to take it before it goes into effect.[16] In New York, a gift to a university contingent on the death of testator's son without issue has been held to depend on the capacity of the university to take at the death of the son and not at the death of the testator.[17] The question, whether an enlargement of the powers of a corporation after a gift has become effective, will cure the defect of a lack of power, has not as often arisen as one would be inclined to believe. It has indeed been held in Massachusetts that a bequest to a town in New York, which at the time of the testator's death is incapable of taking, is valid and will be paid to it as soon as it acquires the necessary power.[18]

§ 348. **Executory Devise. Validity.** The method of creating a charity by executory devise, just like the method of creating a charity by unconditional gift to a corporation, is not confined to those states which have rejected the English charity rule, but may be employed in all the various states. A gift to trustees in trust to be turned over by them to a corporation as soon as it is incorporated, therefore, creates a valid charity,[19] and is a valid executory devise[20] if it is sufficiently definite and certain.[1] "There can be no distinction between a gift of property to an executor to be conveyed by him to a corporation thereafter to be established, to be held by that corporation in trust for a charitable purpose,

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v. Hepburn, 57 Hun. 161, 10 N. Y. Supp. 817, 32 N. Y. St. Rep. 943; 1891, Longheed v. Dykeman Baptist Church, 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410; 1839, McIntire Poor School v. Zanesville Canal and Mfg. Co., 9 Ohio 203, 289, 34 Am. Dec. 436. For a Minnesota case which goes beyond this, see 1897, Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559.

[16] 1902, Clayton v. Hallett, 30 Colo. 231, 255, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117.

[17] 1907, In re Durand, 107 N. Y. Supp. 393, 56 Misc. 235 (affirmed 111 N. Y. Supp. 1118, 127 App. Div. 945). But see 1860, Leslie v. Marshall, 31 Barb. 560 (N. Y.).

[18] 1876, Fellows v. Minor, 119 Mass. 541, 545.

[19] 1881, Taylor v. Bryn Mawr College, 34 N. J. Eq. (7 Stew.) 101, 106.

[20] 1874, Ould v. Washington Hospital for Foundlings, 1 MacArthur 541, 553, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[1] 1899, Keith v. Scales, 124 N. C. 497, 510, 511, 32 S. E. 809; 1839, McIntire Poor School v. Zanesville Canal and Mfg. Co., 9 Ohio 203, 34 Am. Dec. 436.

and a gift to an executor to be by him conveyed to an existing institution, or to a natural person to be selected by him to be held by that institution, or natural person in trust for a charitable purpose.''[2] Such gifts have, therefore, received universal approbation.[3]

§ 349. **Gifts in Presenti.** A gift to an existing charitable corporation, or to such a corporation to be organized in the future, is not the only means of creating a charity in states which have abolished the English charity doctrine. A very vital distinction exists between gifts **per verba de presenti** and gifts **per verba de futuri.**[4] It is good policy to encourage benefactions by the living rather than posthumous beneficence. In respect to gifts **in presenti,** therefore, no restraints are imposed except those demanded in justice to creditors, while in regard to testamentary gifts salutory limitations by prohibiting devises except to institutions authorized by law to take are proper.[5] ''A deceased donor who speaks through his will, and who must make the law the instrument for the accomplishment of his wishes, is under limitations which do not apply to a living donor who bestows his bounty by his own act upon objects which he himself identifies.''[6] It has, therefore, been held in Maryland that a gift to an unincorporated missionary society consummated **inter vivos** is valid and enforcible.[7]

§ 350. **General Results.** With the exception of gifts to corporations **in esse** or corporations to be organized in the

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[2] 1908, Gill v. Attorney General, 197 Mass. 232, 236, 83 N. E. 676.

[3] 1884, Coit v. Comstock, 51 Conn. 352, 379, 50 Am. Rep. 29; 1885, Appeal of Tappan, 52 Conn. 412; 1911, Huger v. Protestant Episcopal Church, 137 Ga. 205, 206, 73 S. E. 385; 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 368; s. c. 4 Iowa 252 (overruling 1852, Marshall v. Chittenden, 3 G. Green 382 [Iowa]); 1841, Milne v. Milne, 17 La. 46; 1869, Swasey v. American Bible Society, 57 Me. 523, 524; 1888, Dascomb v. Marston, 80 Me. 223, 232, 13 Atl. 888; 1830, Inglis v. Sailor's Snug Harbor, 28 U. S. (3 Pet.) 99, 116, 7 L. Ed. 617; 1874, Ould v. Washington Hospital for Foundlings, 1 MacArthur 541, 552, 29 Am. Rep. 605 (affirmed 95 U. S. 303, 24 L. Ed. 450); 1883, Russell v. Allen, 107 U. S. 163, 27 L. Ed. 397, 2 S. C. Rep. 327; 1890, Field v. Drew Theological Seminary, 41 Fed. 371. See 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 518, 67 C. C. A. 393.

[4] 1857, Fink v. Fink, 12 La. Ann. 301, 321.

[5] 1866, Bascom v. Albertson, 34 N. Y. 584, 612.

[6] 1911, Snowden v. Crown Cork and Seal Co., 114 Md. 650, 661, 80 Atl. 510, Ann. Cas. 1912 A. 679.

[7] 1911, Snowden v. Crown Cork and Seal Co., supra.

future, and with the somewhat more doubtful exception of gifts **in presenti,** there is no possibility of charitable trusts in states which have abolished the English charity rule, except so far as such rule may have been reëstablished by legislative action.[8] These statutes and their construction must be examined with great care in order to determine whether a gift has the requisite elements of certainty to be upheld in the particular state. Such question will be primarily a matter of state policy while decisions from other states will frequently be more confusing than helpful. It should not be overlooked, however, that the general trend is distinctly in the direction of the English charity doctrine whose establishment (or reëstablishment) may, therefore, be confidently looked forward to in all the states which have departed from it.

§ 351. **Majority Group. Generally.** Gifts to charitable corporations, whether they are in being or are to be organized in the future, are ordinarily (whatever their form) absolute gifts rather than charitable trusts. While their purpose, like that of the corporation, is charitable, the corporation takes the gift as an absolute one and administers it according to the provisions of its charter. This leaves a vast mass of cases in states outside of those which have abolished the English charity doctrine which construe gifts to trustees for some charitable purpose, or to unincorporated charitable associations, or to a more or less clearly defined class of beneficiaries, or even to a charitable purpose direct. In gifts of this nature the question of the necessary definiteness becomes one of prime importance and will, therefore, be dealt with in the remaining pages of this chapter.

§ 352. **Indefiniteness of Beneficiaries essential.** Indefiniteness of their beneficiaries is the chief feature which dis-

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[8] See Chapter 2; 1909, Rong v. Haller, 109 Minn. 191, 123 N. W. 471, 806, 26 L. R. A. (N. S.) 825; 1861, Phelps v. Pond, 23 N. Y. 69, 77; 1865, Levy v. Levy, 33 N. Y. 97, 135; 1881, Stonestreet v. Doyle, 75 Va. 356, 364, 40 Am. Rep. 731; 1897, Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; 1886, Mong v. Roush, 29 W. Va. 119, 126, 11 S. E. 906; 1886, Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302; 1888, Heiskel v. Trout, 31 W. Va. 810, 8 S. E. 557; 1904, Weaver v. Spurr, 56 W. Va. 95, 105, 48 S. E. 852; 1890, In re Fuller, 75 Wis. 431, 44 N. W. 304.

tinguishes private from charitable trusts.[9] In a private trust, certain specified **cestui que trustent** must be clearly identified or made capable of identification by the terms of the instrument creating the trust, while it is an essential feature of a public charity that the beneficiaries are uncertain—a class of persons described in some general language, often fluctuating and changing in their individual members.[10] If all the recipients of a charity could be designated with certainty at the time of its creation, there would be no necessity for a law of charitable uses different from that which govern all other trusts.[11] The rule that there must be no uncertainty in a trust, therefore, has its exception in charitable uses.[12] As to them there need not be a **cestui que trust** so definitively described as to enable the court of equity to execute the trust upon ordinary principles.[13] From the necessity of the case they form exceptions to the rule which requires a definite grantee.[14] The very purpose of the rise and development of the law of charities was to obviate the strict rule of law which condemns trusts unless the beneficiaries are so named or identified that they have a standing in the courts to enforce the trust.[15] The entire system of charitable trusts is in disregard of the rules of law which require a definite beneficiary.[16] "It is for the very reason that trusts for charitable purposes are not fully expressed and clearly defined that the law of charitable uses has grown up and been maintained."[17] Indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, therefore, does not

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[9] 1912, Ackerman v. Fichter, 179 Ind. 392, 399, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117; 1896, Bedford v. Bedford, 99 Ky. 273, 290, 35 S. W. 926, 18 Ky. Law. Rep. 193; 1907, Hadley v. Forsee, 203 Mo. 418, 427, 101 S. W. 59; 1909, Hagen v. Sacrison, 19 N. D. 160, 174, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[10] 1891, Pennoyer v. Wadhams, 20 Ore. 274, 278, 25 Pac. 720, 11 L. R. A. 210; 1887, Hunt v. Fowler, 121 Ill. 269, 275, 12 N. E. 331.

[11] 1860, Chambers v. St. Louis, 29 Mo. 543, 589, 590.

[12] 1904, In re Daly, 208 Pa. 58, 64, 57 Atl. 180; 1921, Wachovia Banking and Trust Co. v. Ogburn, 181 N. C. 324, 107 S. E. 238.

[13] 1862, Williams v. Pearson, 38 Ala. 299, 306.

[14] 1856, Miller v. Chittenden, 2 Iowa (2 Clark) 315, 376, s. c. 4 Iowa 252; 1863, Newmarket v. Smart, 45 N. H. 87, 98.

[15] 1914, Utica Trust and Deposit Co. v. Thompson, 149 N. Y. Supp. 392, 397, 87 Misc. Rep. 31.

[16] 1876, Adye v. Smith, 44 Conn. 60, 67, 26 Am. Rep. 424.

[17] 1879, First Society M. E. Church v. Clark, 41 Mich. 730, 741, 3 N. W. 207.

militate against the validity of a trust for charitable uses.[18] A claim that there must be some beneficiary capable of enforcing a charity, if allowed, would abolish all charitable trusts.[19]

§ 353. **Private and Charitable Trusts. Distinction.** The distinction between private and charitable trusts must now be clear. Where a grant to trustees is made in perpetuity for beneficiaries who are indefinite, vague and uncertain, the grant cannot be upheld as a private trust,[1] while if the individual beneficiaries are named such a trust cannot be upheld as a charitable one.[2] Gifts to charitable uses will, therefore, be established and enforced where similar gifts for other purposes would be void for vagueness and uncertainty.[3] A statute which requires that the beneficiaries of a trust be named clearly does not refer to charitable trusts.[4] A person who founds his claim on right is not the subject of charity.[5] A bequest for the aid or benefit of defined persons is, therefore, not a charity but a trust only.[6] That certainty and definiteness which is the badge of private rights is the bane of public charities. "The greatest of all solecisms in law, morals, or religion, is the supposition of a charity to individuals personally known and selected by the giver."[7]

§ 354. **Indefiniteness of Beneficiaries as a Test.** It follows from what has just been said that vagueness, uncertainty and indefiniteness of the beneficiaries is not merely a permissible, but actually essential element of a public charity.[8] From the very nature of things, such beneficiaries are vague

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[18] 1900, Harrington v. Pier, 105 Wis. 485, 514, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[19] 1901, Haynes v. Carr, 70 N. H. 463, 482, 49 Atl. 638.

[1] 1911, Buchanan v. Kennard, 234 Mo. 117, 131, 136 S. W. 415.

[2] 1908, In re Nilson, 81 Neb. 809, 815, 116 N. W. 971.

[3] 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 106, 1 Rich. Law. 176 note (S. C.).

[4] 1881, Estate of Hinkley, 58 Cal. 457, 483.

[5] 1901, In re Stewart, 26 Wash. 32, 35, 66 Pac. 148, 67 Pac. 723.

[6] 1889, Bullard v. Chandler, 149 Mass. 532, 540, 21 N. E. 951, 5 L. R. A. 104.

[7] 1847, State v. Griffith, 2 Del. Ch. 392, 409.

[8] 1898, People v. Cogswell, 113 Cal. 129, 137, 45 Pac. 270, 35 L. R. A. 269; 1882, Erskine v. Whitehead, 84 Ind. 357, 369; 1913, Dykeman v. Jenkines, 179 Ind. 549, 564, 101 N. E. 1013, Ann. Cas. 1915 D. 1011; 1901, Troutman v. De Boissiere Odd Fellows' Orphan Home, 64 Pac. 33, 38, 5 L. R. A. (N. S.) 692 (Kans.); 1910, Sprowl v. Blankenbaker, 127 S. W. 496 (Ky.); 1911, Buchanan v. Kennard, 234 Mo. 117, 131, 136 S. W. 415; 1916, Buckley v. Monck, 187 S. W. 31, 34 (Mo.); 1904, In re Daly, 208 Pa. 58, 64, 57 Atl. 180.

and indefinite and must be looked up and ascertained, and relief must be administered to them according to the direction and judgment of those designated to select them.[9] While, therefore, the objects of a charitable trust must be certain, its individual beneficiaries must be uncertain if it is to retain its character.[10] While its purposes must be public, its beneficiaries must be indefinite.[11] Uncertainty of beneficiaries, until they are appointed or selected, is in the case of charitable trusts a never-failing attendant.[12] "Charity cannot be confined to the narrow channels, prescribed for other trusts, without detriment to its inmost character. It flourishes by diffusion. It belies itself when it contracts itself. Uncertainty is its native element."[13] It actually "delights in uncertainty"[14] and is essentially shifting.[15] It draws its strength from the fact that its benefits are to be distributed among unknown persons.[16] Its very generality "is an illustration of Christian charity; and uncertainty of individual objects at the time of the gift is its characteristic and element."[17] The omission of specifications as to persons to be benefited is its one distinctive test.[18]

§ 355. **Vagueness of Beneficiaries no Objection.** Since vagueness of beneficiaries is a characteristic of charitable trusts it certainly is no objection to them.[19] The law does not require that a testator be more particular in the description of the objects of his bounty than are the terms of the statute which authorizes such a gift.[20] Charitable trusts may, therefore, be indefinite[21] and will not be declared to be void

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[9] 1835, Burr v. Smith, 7 Vt. 241, 286, 29 Am. Dec. 154.

[10] 1913, Hays v. Harris, 73 W. Va. 17, 23, 80 S. E. 827.

[11] 1911, Moseley v. Smiley, 171 Ala. 593, 596, 55 So. 143; 1885, Burke v. Roper, 79 Ala. 138, 142; 1900, In re Willey, 128 Cal. 1, 12, 60 Pac. 471.

[12] 1847, State v. Griffith, 2 Del. Ch. 392, 409.

[13] 1884, Pell v. Mercer, 14 R. I. 412, 438.

[14] 1906, Tincher v. Arnold, 147 Fed. 665, 670, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[15] 1879, Dodge v. Williams, 46 Wis. 70, 98, 50 N. W. 1103, 1 N. W. 92.

[16] 1921, In re Johnson, 100 Ore. 142, 196 Pac. 385, 390, 1115.

[17] 1853, State v. McDonogh, 8 La. Ann. 171, 248.

[18] 1893, Fox v. Gibbs, 86 Me. 87, 93, 29 Atl. 940.

[19] 1896, Sawtelle v. Witham, 94 Wis. 412, 414, 69 N. W. 72; 1915, Rust v. Evenson, 161 Wis. 627, 632, 115 N. W. 145.

[20] 1884, Coit v. Comstock, 51 Conn. 352, 379, 50 Am. Rep. 29.

[21] 1884, Pell v. Mercer, 14 R. I. 412, 435.

for uncertainty of beneficiaries.[22] It is no objection that the beneficiaries are unknown and incapable of dealing with the legal title.[23] If the bequest be for charity, it matters not how uncertain the beneficiaries may be, or whether they are in being or not.[24] A gift to a trustee for a charity is valid though no beneficiary can enforce the trust.[1] A bequest "to create a public sentiment" for a lawful charitable object is definite enough to be supported.[2] A gift to a trustee for the Women's Board of Home Missions of the Presbyterian Church is valid. The beneficiaries are not the members of the board but those whom they seek to benefit.[3] A donation to a trustee with power each year to select an institution engaged in the charities contemplated and described creates a valid charity.[4] A testamentary gift to a college for a professorship to teach the conservative doctrines of the church to which testator belonged, which doctrines were being taught by the college, sufficiently sets forth the purposes of the gift under the Kentucky statute.[5]

§ 356. **The Purpose must be definite.** Closely related with the question of uncertainty of beneficiaries is the question of indefiniteness of purpose. It is clear that, if the purpose of a testator cannot be ascertained, the beneficiaries become absolutely unascertainable. A trust may, therefore, "be so indefinite and uncertain in its purposes as distinguished from its beneficiaries as to be impracticable, if not impossible for the courts to administer."[6] The use, therefore, must be for some purpose clearly defined.[7] Indefinite charitable trusts are void even in England, both at law and in equity, and are carried into execution by the king as **parens patriae** under his sign manual only. The courts in this country, while they have succeeded to the powers and jurisdic-

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[22] 1905, Columbian University v. Taylor, 25 App. D. C. 124, 131; 1911, Peth v. Spear, 63 Wash. 291, 115 Pac. 164.

[23] 1911, Smith v. Gardiner, 36 App. D. C. 485, 487.

[24] 1867, Heuser v. Harris, 42 Ill. 425, 434.

[1] 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan) 348, 367.

[2] 1867, Jackson v. Phillips, 96 Mass. 539, 565.

[3] 1918, Gould v. Board of Home Missions, 102 Neb. 526, 167 N. W. 776.

[4] 1921, Johns v. Birmingham Trust and Savings Co., 205 Ala. 535, 88 So. 835.

[5] 1922, Bailey v. Waddy, 195 Ky. 415, 243 S. W. 21.

[6] 1908, In re Schattuck, 193 N. Y. 446, 451, 86 N. E. 455.

[7] 1871, Grimes v. Harmon, 35 Ind. 198, 204, 9 Am. Rep. 690.

tion of the English chancery court, have not succeeded to the prerogative of the crown, nor is there here any sovereign direction which they are bound to follow.[8] Little indeed can be said in favor of the charitable intentions of a testator who disinherits his heirs and next of kin, but is not sufficiently interested in his own purposes to sufficiently specify them or to indicate the manner in which his money is to be applied. "If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the moral and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertained individuals, it does not admit of judicial administration.[9] That such indefiniteness of purpose is a fatal defect in America cannot be doubted, as the prerogative **cy pres** doctrine has no application on this side of the Atlantic. Since American tribunals are not clothed with the prerogative of the crown, but are invested only with judicial authority, the English doctrine of charitable trusts is not in force in America so far as gifts are concerned whose purposes are so indefinite that they cannot be executed by the courts.[10] A gift to be valid must, therefore, not only be consistent with local law and policy, but must define the donor's purpose clearly and certainly,[11] and with such sufficiency that the courts at the instance of the attorney general can by order direct the carrying out of the trust duty.[12] Where such uncertainty exists that the courts cannot see what purpose the testator had in view, the legacy or trust must fail.[13] Of course, the mere fact that the gift is somewhat obscure and irrational is not enough. It must be without any clear meaning.[14] It has, therefore, been held that a gift to be applied to the Lord's work,[15] or to be used in the Lord's

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[8] 1849, Ayres v. M. E. Church, 5 N. Y. Super. Ct. 351, 366, 8 N. Y. Leg. Obs. 17.

[9] 1871, Grimes v. Harmon, 35 Ind. 198, 220, 9 Am. Rep. 690.

[10] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 548. See Chapter 3, Sections 120, 121, 122.

[11] 1837, Potter v. Chapin, 6 Paige 639, 549, 650 (N. Y.); 1862, Goddard v. Pomeroy, 36 Barb. 546 (N. Y.).

[12] 1908, **In re** Shattuck, **supra.**

[13] 1876, Schmucker v. Reel, 61 Mo. 592, 600.

[14] 1920, Jones v. Dorchester, 224 S. W. 596 (Tex. Civ. App.).

[15] 1911, **In re** Compton, 131 N. Y. Supp. 183, 72 Misc. Rep. 289.

way,[16] or to promote the cause of God,[17] or to assist the poor saints,[18] or the orthodox Protestant clergymen of a certain place,[19] or for missionary[20] or temperance purposes,[21] or home missions,[22] or purposes of education or religion,[23] or merely to the treasurer of the prohibition party,[24] or to three persons "to be divided among the sisters of charity,"[1] is void for indefiniteness. It has been held that, where a testator merely has in mind a vague and shadowy conception of a dispensary without any determinate views as to the place of its foundation, the mode of perpetuating and governing it, or the amount of expenditure and investment necessary to establish and maintain it, the bequest is wanting in all the elements of certainty which are necessary to impart validity to it.[2] However, a bequest to "be sent to the country and destitute places that the poor may have the gospel preached to them" has been upheld.[3] A gift for a monument "dedicated to and illustrative of music, which said monument shall be designed and executed in such manner as at once to instruct and adorn," is not void for uncertainty.[4] A devise to a trustee "for the diffusion of the gospel truth" in a certain part of the United States has been upheld, though the court realized that there is a wide difference of opinion as to what is gospel truth.[5] The actual existence of an unfilled blank in a will will make no difference where the sentence is complete without it. A gift stating that certain

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[16] 1912, Arnett v. Fairmount Trust Co., 70 W. Va. 296, 73 S. E. 930.

[17] 1880, Reeves v. Reeves, 73 Tenn. (5 Lea) 644, 651.

[18] 1845, Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94.

[19] 1871, Grimes v. Harmon, 35 Ind. 198, 210, 9 Am. Rep. 690.

[20] 1890, People v. Dashaway Ass'n, 84 Cal. 114, 123, 24 Pac. 277, 12 L. R. A. 117.

[21] 1917, Jones v. Patterson, 271 Mo. 1, 195 S. W. 1004.

[22] 1845, Bridges v. Pleasants, 39 N. C. 26, 44 Am. Dec. 94.

[23] 1902, Coleman v. O'Leary, 114 Ky. 388, 405, 24 Ky. Law. Rep. 1248, 70 S. W. 1068.

[24] 1920, Union Trust and Savings Bank v. Ishkanian, 45 Cal. App. 347, 187 Pac. 757.

[1] 1897, Moran v. Moran, 104 Iowa 216, 73 N. W. 617, 65 Am. St. Rep. 443, 39 L. R. A. 204.

[2] 1861, Beekman v. Bonsor, 23 N. Y. 298, 305, 575, 80 Am. Dec. 269.

[3] 1918, Miller v. Tatum, 181 Ky. 490, 205 S. W. 557.

[4] 1918, Rhode Island Hospital Trust Co. v. Benedict, 41 R. I. 143, 103 Atl. 146.

[5] 1871, White v. Howard, 38 Conn. 342, 366.

rents "shall forever be appropriated to the education of —— children of this town," therefore, creates a valid charity.[6]

§ 357. **Definiteness of Purpose. Reason.** This doctrine is not based on any technical grounds, but rests on the inherent limitations of the courts. "The rule as to declaring indefinite trusts void has not been put upon any ground of public policy. They are declared void because the nature and functions of courts are such that there is no power to carry out the aims of the donor."[7] While charity is not limited by natural or artificial boundaries, nor circumscribed by climate, race or religion, the due administration of a charitable trust by the courts is unfortunately not capable of extending over so vast an area. "A court of chancery, always acting for the beneficiaries, stops the instant it ascertains that there are none, or that they are so uncertain that it will have to act in the dark when it sets about the application of the trust."[8] Impracticability of execution is, therefore, the real objection to indefiniteness of purpose.[9] Only when the object of a trust is so specific that the court can by decree effectuate it according to the intention of the donor, will it be able to act at all in the matter.[10]

§ 358. **Definiteness of Purpose. Liberal Construction.** It must not be supposed, however, that courts will lean against a trust in an effort to discover a fatal vagueness of purpose. On the contrary, they are quite uniformly reluctant to admit uncertainty as a ground for avoiding them,[11] and will carry out a charitable purpose "unless there is such an uncertainty that the law is fairly baffled."[12] They will not require an exact and careful description of the purpose, but will be satisfied if it is sufficiently indicated to bind the conscience of the trustees.[13] All that will be necessary is that the language used indicate with reasonable certainty the object

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[6] 1854, Richmond v. State, 5 Ind. 334, 337.

[7] 1901, Haynes v. Carr, 70 N. H. 463, 480, 49 Atl. 638.

[8] 1871, Grimes v. Harmon, 35 Ind. 198, 252, 9 Am. Rep. 690.

[9] 1909, Korsstrom v. Barnes, 167 Fed. 216, 222.

[10] 1845, White v. Attorney General, 39 N. C. (4 Ired. Eq.) 19, 44 Am. Dec. 92.

[11] 1887, Gafney v. Kenison, 64 N. H. 354, 356, 10 Atl. 706. See 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434.

[12] 1904, Cook v. Universalist General Convention, 138 Mich. 157, 179, 101 N. W. 217.

[13] 1856, Derby v. Derby, 4 R. I. 414, 437.

of the donor.[14] Such language need not at all be technical. "The business of the world will not, cannot, wait until every word shall become mathematically precise."[15] Bequests to such educational and charitable institutions respectively, as are similar to those mentioned in another part of the will,[16] and gifts to be applied in such manner as charity is usually distributed by the ministers at large in the city of Boston[17] have, therefore, been upheld. A gift "for the use, privilege and benefit of a public seminary" has been applied to a seminary established after testator's death in the county of his residence.[18] The beneficiaries may even be selected by the accident of the membership of testator's wife in a certain church at the time of her death.[19]

§ 359. **Geographical Boundaries.** Where the testator attempts to limit his bounty by some geographical subdivision of territory, no difficulty will be encountered where a city, county, township or other municipal corporation is selected.[20] Donors, however, are not always so exact, but sometimes describe the territory in a very vague manner. The question whether such a gift is void for indefiniteness has generally been decided in the negative, the courts holding that a trust for charitable purposes is valid though the limits fixed are not geometrically exact.[21] The mere fact that a charitable gift is made for the benefit of the "westerly part" of a certain town which is ill defined and has no corporate existence, therefore, has been held not to render the gift void.[1] Similarly, a trust for the benefit of a certain "neighborhood"[2] has been upheld, though there is no practical method of determining where one neighborhood begins and another ends.[3]

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[14] 1909, Hagan v. Sacrison, 19 N. D. 160, 174, 123 N. W. 518, 24 L. R. A. (N. S.) 724.

[15] 1886, Beardsley v. Bridgeport, 53 Conn. 489, 492, 3 Atl. 557, 55 Am. Rep. 152.

[16] 1884, Rhode Island Hospital Trust Co. v. Olney, 14 R. I. 449.

[17] 1856, Derby v. Derby, 4 R. I. 414, 437.

[18] 1839, Curling v. Curling, 38 Ky. (8 Dana) 38, 33 Am. Dec. 475.

[19] 1848, Attorney General v. Jolly, 2 Strob. Eq. 379 (S. C.).

[20] See Chapter 11, Sections 480-482.

[21] 1893, Sears v. Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502.

[1] 1843, Second Congregational Society v. First Congregational Society, 14 N. H. 315, 328. But see 1812, Barker v. Wood, 9 Mass. 419.

[2] 1861, Stallman's Appeal, 38 Pa. (2 Wright) 200; 1836, Martin v. McCord, 5 Watts 493, 495 (Pa.); 1862, Pott v. School Directors of Pottville, 42 Pa. 132, 142.

[3] 1891, Nolte v. Meyer, 79 Tex. 351, 15 S. W. 276; 1856, Gould v.

§ 360. **Subject-Matter Generally.** While vagueness of beneficiaries is a necessary attribute of every charitable trust, while its particular purpose may be indicated rather than described, the subject-matter of it is subject to the same rules which apply to private trusts.[4] The amount of the gift must be certain in any event.[5] This, of course, does not mean that the description of the property donated by the testator must be perfect in every detail. Courts do not require that the subject of a donor's gift have all the earmarks given to it by the testator. It may to some extent have different earmarks and yet be sufficiently within his description.[6] However, the subject-matter of a gift must be ascertainable from the language used either taking such language by itself or in connection with the circumstances out of which it has arisen. Where an undefined portion of a fund is given to a void charity and the balance is sought to be given to a valid charitable purpose, such gift must fail because it cannot be ascertained how much was intended for the illegal object.[7] A different case is presented where a devise directs that an ascertainable portion of the fund shall be expended for a private and the balance for a charitable purpose. In such case the latter provision is valid even though the former is void.[8] Thus, where the testator gives $3,000 to a church for the care of his burial lot with a provision that, if the income is more than sufficient, the balance is to be used at the discretion of the vestry and it is established by proof that the increase of $500 is ample for the care of the lot, the sum given for such a private purpose is ascertainable and the charitable purpose will be carried out in regard to the balance.[9] A testator may also make his gift certain by personally fencing the land which he gives to a charitable purpose.[10] A residuary bequest to charity will be construed to

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Whitman, 3 R. I. 267. But see 1801, Jackson v. Sisson, 2 Johns Cases 321, 323.

[4] 1890, Chase v. Stockett, 72 Md. 235, 240, 19 Atl. 761.

[5] 1848, Beall v. Fox, 4 Ga. 404, 427.

[6] 1874, Roy v. Rowzie, 66 Va. (25 Grat.) 599, 605.

[7] 1858, Beekman v. People, 27 Barb. 260, 278, 279 (affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[8] 1913, Smart v. Durham, 77 N. H. 56, 86 Atl. 821.

[9] 1923, Todd v. St. Mary's Church, —— R. I. ——, 120 Atl. 577.

[10] 1865, McLain v. School Directors of White Twp., 51 Pa. (1 P. F. Smith) 196, 199.

cover cash on hand though the donor specifically mentioned only bonds and stocks.[11] Where a testator, after making gifts of life estates, gives, bequeaths, and devises to a charitable institution (not designating what she thus donates), the courts will infer that the clause covers the remainder.[12]

§ 361. **Illustrations.** It will not be difficult to multiply other examples. It is clear that there is no indefiniteness as to the subject-matter of a gift where an entire residue is bequeathed to charity.[13] This is particularly so where the will provides that one piece of property is at any rate to become a part of such residue.[14] Nor will the fact that the testator has underestimated such residue make any difference.[15] Similarly, a legacy of a sum not exceeding a certain amount does not create any fatal uncertainty, it will be taken that the amount stated is intended to represent the size of the gift.[16] It will not be necessary that the amount given be stated in figures. A bequest of a "sum of money sufficient to carry out" testator's charitable intent, which is otherwise clearly defined so as to make it possible to derive at a correct estimate of the sum needed, is, therefore, definite enough.[17] A gift to a hospital of an annuity of fifty dollars is not void for uncertainty, though it is somewhat difficult on account of the varying rate of interest to ascertain the sum to be set aside for it.[18] A charitable trust dependent on a life estate in testator's wife, which may be sold if she should deem such a step necessary to supply herself with the comforts and necessities of life, is enforcible and not void for indefiniteness.[19] The fact that one clause provides merely that "a part" of testator's estate is to be used for a charitable purpose will not render the gift invalid where a subsequent clause provides that the balance is to be used for

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[11] 1884, Pell v. Mercer, 14 R. I. 412, 429.

[12] 1921, In re McGeehan, 187 N. Y. Supp. 823, 115 Misc. 737.

[13] 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 334, 84 N. E. 256, 122 Am. St. Rep. 169.

[14] 1911, French v. Calkins, 252 Ill. 243, 253, 96 N. E. 877.

[15] 1906, Harris v. Neal, 61 W. Va. 1, 55 S. E. 740.

[16] 1905, Speer v. Colbert, 200 U. S. 130, 146, 50 L. Ed. 403, 26 S. C. Rep. 201 (Affirming 24 App. D. C. 187).

[17] 1890, Field v. Drew Theological Seminary, 41 Fed. 371.

[18] 1905, Crawford v. Mound Grove Cemetery, 218 Ill. 399, 410, 75 N. E. 998.

[19] 1913, Burke v. Burke, 259 Ill. 262, 269, 102 N. E. 293.

the same purpose.[20] Of course, where a testator donates a sum not to exceed $100,000 to a city, on condition that it contribute a like sum for the erection of a pleasure pier, the city has no right to require a sequestration of the fund until it performs the condition and thus fixes the sum to which it is to be entitled.[21]

§ 362. **Unincorporated Society. Generally.** Testators do not ordinarily discriminate between incorporated and unincorporated societies. An association with which they have been connected, or which they have known for a long time, is an entity to them, though it has not acquired any legal existence by procuring a charter. In consequence, numerous gifts have been and are being made direct to such unincorporated societies and have led to protracted litigation.

§ 363. **Unincorporated Society. English History.** Historically, this question offers little difficulty. The statute of 23, Henry the Eighth, Chapter 10, passed in 1531, seventy years before the statute of Elizabeth, in its preamble expressly refers to feoffments and other conveyances made of trust to the use of parish churches, chapels, church wardens, and other bodies made of devotion "without any corporation" and shows clearly that at common law the want of a charter of incorporation was no impediment to a body of men changing from time to time from receiving and distributing, according to the intent of the donor, money or other property given or granted for a charitable use.[22] In England, therefore, under the statute of Elizabeth, as well as at common law and under the royal prerogative, a legacy to an unincorporated society is not for that reason invalid, but has been universally sustained.[23] Says the Pennsylvania court: "Equity finds ways to sustain charitable trusts or uses, without necessarily creating corporations for that purpose."[24]

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[20] 1907, Welch v. Caldwell, 226 Ill. 488, 495, 80 N. E. 1014.

[21] 1921, In re Honk's Estate, 186 Cal. 643, 20 Pac. 417.

[22] 1835, Burr v. Smith, 7 Vt. 241, 278, 29 Am. Dec. 154. But see 1867, Heuser v. Harris, 42 Ill. 425, 430.

[23] 1837, King v. Woodhull, 3 Edw. Ch. 79, 91 (N. Y.). That such is the law in England was, therefore, admitted by counsel in Philadelphia Baptist Association v. Hart, 17 U. S. (4 Wheat.) 1, 29, 4 L. Ed. 499 (1819).

[24] 1835, Babb v. Reed, 5 Rawle 151, 158, 28 Am. Dec. 650 (Pa.).

§ 364. **Unincorporated Society. History in America.** In America the question has not proved to be so simple, and has in consequence led to a division in the authorities. Lack of information concerning the situation in England before the time of Elizabeth has led the United States Supreme Court, in 1819, to hold that a gift of certain military certificates to the Baptist Association, an unincorporated body which had held annual meetings in Philadelphia for many years before the testator's death, but was not incorporated until after that event, which gift was to be a perpetual fund for the education of youths of the Baptist denomination who should appear to be promising for the ministry, was void because the association, not being incorporated at the time of the donor's death, was incapable of taking.[1] This decision, on account of the high standing of the court from which it emanated, and on account of the fact that the opinion was written by Chief Justice Marshall and concurred in by the entire court, including Justice Story, who wrote a concurring opinion, had an important influence on the earlier cases and has fixed to this day the doctrine of Virginia, West Virginia, Maryland and the District of Columbia on the subject of charitable trusts.[2]

§ 365. **Unincorporated Society. History in America continued.** It is fortunate, however, that the court did not adhere to this error but reversed its position in 1844, after researches on both sides of the Atlantic had clearly shown that it was erroneous.[3] In the meantime, however, Virginia and Maryland had incorporated this error into their jurisprudence, and were later followed by West Virginia, while New York, Michigan, Wisconsin and Minnesota were soon to follow, though for a somewhat different reason,[4] and other

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[1] 1819, Philadelphia Baptist Association v. Hart, 17 U. S. (4 Wheat.) 1, 4 L. Ed. 499. Compare 1815, Pawlet v. Clark, 13 U. S. (9 Cranch) 292, 332, holding that a donation for the use of a non-resident parish church may well take effect as a dedication to pious uses.

[2] See Chapter 2, Sections 35 to 45. Says the Maryland court: "It is clear that a bequest or devise to an unincorporated association is void, and it is only by virtue of that peculiar jurisdiction exercised by courts of equity, in regard to charitable uses, that such bequests have ever been sustained." 1867, State v. Warren, 28 Md. 338, 352.

[3] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 11 L. Ed. 205.

[4] See Chapter 2, Sections 34 to 69.

states remained undecided and vacillated more or less until finally struggling through to a correct solution. In consequence, the question has received thorough consideration from all possible angles and can, therefore, now be treated with exactness.

§ 366. **Gift to Trustee for Unincorporated Society, or to such Society as Trustee.** The situation is a simple one where the gift is made in the customary form to individuals in trust for an unincorporated charitable society. This, in fact, was the form developed in the early period of our history for the purpose of enabling dissenting churches to acquire property after the established churches had begun to disintegrate and before dissenting churches had been given power to become corporations. There can be no question under such a gift that the legal owner at least is clearly ascertained. Such gifts have, therefore, been universally upheld.[5] A devise to trustees for "the Catholic church on my farm" has been sustained though the church was not incorporated.[6] The trustees need not be named but may instead be described[7] as persons holding certain offices created by the societies in question, such as vestrymen,[8] poor officers,[9] overseers,[10] stewards,[11] trustees,[12] treasurers,[13] or committeemen.[14] There can be no doubt that such officers are persons precisely described, and as effectually identified as if they had been

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[5] 1815, Bartlett v. King, 12 Mass. 536, 541, 7 Am. Dec. 99; 1856, Johnson v. Mayne, 4 Iowa (4 Clark) 180, 192. **Contra;** 1876, Ruth v. Oberbrunner, 40 Wis. 238, 263. Distinguished on the ground that there is no suggestion in the will of any charity. 1879, Dodge v. Williams, 46 Wis. 70, 100, 50 N. W. 1103. See also 1897, McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 65 Am. St. Rep. 106. 40 L. R. A. 724.

[6] 1888, Seda v. Huble, 75 Iowa 429, 39 N. W. 685, 9 Am. St. Rep. 495.

[7] 1918, Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490.

[8] 1905, Biscoe v. Thweatt, 74 Ark. 545, 548, 86 S. W. 432.

[9] 1843, Zimmerman v. Anders, 6 Watts and S. 218, 220, 40 Am. Dec. 552 (Pa.).

[10] 1863, Dexter v. Gardner, 89 Mass. (7 Allen) 243.

[11] 1912, Crim v. Williamson, 180 Ala. 179, 182, 60 So. 293.

[12] 1906, Christian Church v. Church of Christ, 219 Ill. 503, 513, 76 N. E. 703. **Contra** 1880, Daniel v. Fain, 73 Tenn. (5 Lea) 319, 324; 1846, Smith v. Nelson, 18 Vt. 511, 541.

[13] 1848, Beall v. Fox, 4 Ga. 404, 428; 1895, **In re** Bartlett, 163 Mass. 509, 515, 40 N. E. 899; 1839, Wright v. M. E. Church, 1 Hoff. Ch. 202 (N. Y.); 1876, American Tract Society v. Atwater, 30 Ohio St. 77, 91, 27 Am. Rep. 422; 1835, Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154. **Contra.** 1871, White v. Howard, 46 N. Y. 144, 163.

[14] 1905, Wood v. Fourth Baptist Church, 26 R. I. 594, 61 Atl. 279.

named.[15] Nor is the situation substantially changed where an unincorporated society is appointed as trustee.[16] If it is true that such a voluntary and fluctuating body of persons, unknown to the law and irresponsible to the courts, is incapable of taking a gift as a trustee,[17] the trust will not for that reason fail, but equity will, if necessary, appoint a trustee to take its place.[18]

§ 367. **New York Development.** The development in New York in this matter has been peculiar. According to the earlier cases, the capacity of an unincorporated charitable society to take a gift was so well settled that the supreme court of the state in 1848 said: "The legality of bequests for pious and charitable uses, though for the benefit of unincorporated associations, is so well established in this state, that it is barely necessary to refer to the authorities."[19] When, however, New York strayed away from the English charity doctrine,[20] a complete change took place. A gift to an unincorporated society was held to be void because the persons constituting its members are a fluctuating body, unknown to the law, irresponsible to the courts, and incapable of receiving a gift even for a purpose which the law denominates as charitable.[1] Nor did it make any difference that the society acquired corporate rights after the will had become effective by the death of the testator. A gift invalid at that time could not be validated by any action taken by the society. A charter of incorporation was, therefore, completely unavailing.[2] This situation was not completely

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[15] 1843, Tucker v. Seaman's Aid Society, 48 Mass. (7 Met.) 188, 200, 201.

[16] 1858, Preachers' Aid Society v. Rich, 45 Me. 552, 559; 1863, Dexter v. Gardner, 89 Mass. (7 Allen) 243; 1895, Wood v. Paine, 66 Fed. 807.

[17] 1864, Sherwood v. American Bible Society, 40 N. Y. (1 Keyes) 561, 4 Abb. Dec. 227, 234.

[18] 1913, Burke v. Burke, 259 Ill. 262, 271, 102 N. E. 293.

[19] 1848, Banks v. Phelan, 4 Barb. 80, 89 (N. Y.). See 1844, Hornbeck v. American Bible Society, 2 Sandf. Ch. 133, 135 (N. Y.); 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 58 (N. Y.); 1837, Potter v. Chapin, 6 Paige 639, 649, 650 (N. Y.).

[20] See Chapter 2, Sections 47-57.

[1] 1861, Downing v. Marshall, 23 N. Y. 366, 383, 80 Am. Dec. 290. For dissenting opinion see 23 How. Prac. 4; 1878, McKeon v. Kearney, 57 How Prac. 349 (N. Y.); 1880, First Presbyterian Society v. Bowen, 21 Hun. 389 (N. Y.); 1897, Pratt v. Roman Catholic Orphan Asylum, 46 N. Y. Supp. 1035, 1036, 20 App. Div. 352 (Affirmed 166 N. Y. 593, 59 N. E. 1120).

[2] 1853, Chittenden v. Chittenden, 1 Am. Law. Reg. (O. S.) 538 (N. Y.); 1856, Owens v. Mission-

changed by the Tilden act passed in 1893 and its subsequent amendments. The remedy provided for by these acts applies only where a trustee of some kind is appointed by the testator, and does not apply where a gift absolute in form is made to an unincorporated association.[3] While an absolute gift to such an association is, therefore, absolutely void in New York, a donation in trust for it is valid and enforcible.[4]

§ 368. **Gift direct to Unincorporated Society.** By the great weight of authority in other states, however, an unincorporated charitable society is able to take property for charitable purposes.[5] Nothing has been more frequent than bequests to unincorporated congregations which have uniformly been applied to their objects. "Surely a usage of such early origin and extensive application may claim the sanction of a law; resting, as it does, on the basis of all our laws of domestic origin—the legislation of common consent."[6] The uncertain, indefinite and fluctuating character of its membership will not prevent a consummation of the design of the donor as the court, if necessary, will appoint a trustee to take and administer the property in accordance with the directions of the donor.[7] This is so particularly in regard

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ary Society of M. E. Church, 14 N. Y. (4 Kern) 380, 67 Am. Dec. 160; 1918, Kernochan v. Farmers' Loan and Trust Co., 170 N. Y. Supp. 850. Modified 175 N. Y. Supp. 831; 1877, Leonard v. Davenport, 58 How. Prac. 384 (N. Y.); 1871, White v. Howard, 46 N. Y. 144, 162.

[3] 1900, Underhill v. Wood, 65 N. Y. Supp. 1105, 53 App. Div. 640; 1911, Washburn v. Acome, 131 N. Y. Supp. 936, 74 Misc. Rep. 301 (Affirmed 136 N. Y. Supp. 1150, 151 App. Div. 948); 1913, In re Gray, 142 N. Y. Supp. 1067, 81 Misc. Rep. 79.

[4] 1916, Ely v. Megie, 219 N. Y. 112, 113 N. E. 800, 808; 1894, Simmons v. Burrell, 28 N. Y. Supp. 625, 8 Misc. 388, 59 N. Y. St. Rep. 554.

[5] 1922, Brinsmade v. Beach, 98 Conn. 322, 119 Atl. 233; 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 337, 84 N. E. 256, 122 Am. St. Rep. 169; 1906, Lewis v. Cornutt, 130 Iowa 423, 439, 106 N. W. 914; 1867, Cromie v. Louisville Orphans' Home Society, 66 Ky. (3 Bush.) 365, 375, 376; 1860, Silsby v. Barlow, 82 Mass. (16 Gray) 329, 331; 1875, Schmidt v. Hess, 60 Mo. 591, 595; 1922, In re Shand's Estate, 275 Pa. 77, 118 Atl. 623; 1890, Lilly v. Tobbein, 103 Mo. 477, 486, 15 S. W. 618, 23 Am. St. Rep. 887; 1916, Society of Helpers of Holy Souls v. Law, 267 Mo. 667, 186 S. W. 718; 1893, Hadden v. Dandy, 51 N. J. Eq. (6 Dick) 154, 161, 26 Atl. 464 (affirmed 51 N. J. Eq. (6 Dick.) 330, 30 Atl. 429); 1856, Attorney General v. Clergy Society, 8 Rich. Eq. 190, s. c. 10 Rich. Eq. 604 (S. C.); 1833, Magill v. Brown, Fed. Cas. No. 8,952, Brightly N. P. 346, 14 Haz. Reg. Pa. 305.

[6] 1827, Witman v. Lex, 17 S. and R. 88, 91, 92. See 1860, Appeal of Evangelical Association, 35 Pa. 316, 319, 320.

[7] 1899, St. Peter's Church v. Brown, 21 R. I. 367, 43 Atl. 642.

to personal property. An unincorporated society for charitable purposes can as well take an absolute gift of personal property as a partnership can purchase a stock of goods.[8] Though it may not be capable of maintaining an action at law to recover a legacy made to it, it may nevertheless receive it so as to discharge the executors from liability.[9] It has, therefore, been held in Maryland, where the English charity doctrine is not recognized, that while a gift by will to an unincorporated charitable association is invalid, a donation to such an association consummated **inter vivos** is valid and enforcible.[10] The rule, however, does not only cover bequests but also devises,[11] though the practical difficulties in such a case are considerably enhanced.[12] It has, therefore, been said that a voluntary society may, in the absence of a statute forbidding it, take, acquire and hold real and personal property by purchase, gift, bequest, or otherwise.[13] "The corporate character of the devisee is not a prerequisite to the validity of a devise."[14] In such a case the law presumes that the governing body of such association is to administer the charity, and when necessary, select the beneficiaries.[15]

§ 369. **Absolute Gift to unincorporated Society as a Charity. Minority Rule.** The question, whether a gift absolute in form to an unincorporated charitable society impresses the donation with a charitable trust, has not been answered with unanimity by the courts. It has been pointed out that, while a charitable use can well be implied from an absolute bequest to a corporation whose objects, purposes and powers are more or less clearly defined by its charter, no such criterion exists in the case of voluntary associations whose purposes may change with the will of the associates and may be pious to-day and impious to-morrow.[16] It has

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[8] 1864, **In re** Ticknor, 13 Mich. 44, 57; 1876, American Tract Society v. Atwater, 30 Ohio St. 77, 91, 92, 27 Am. Rep. 422.

[9] 1844, Parker v. Cowell, 16 N. H. 149.

[10] 1911, Snowden v. Crown Cork and Seal Co., 114 Md. 650, 80 Atl. 510, Ann. Cas. 1912 A. 679.

[11] 1901, American Bible Society v. American Tract Society, 62 N. J. Eq. 219, 50 Atl. 67.

[12] 1870, M. E. Protestant Church v. Adams, 4 Ore. 76; 1831, Stone v. Griffin, 3 Vt. 400.

[13] 1913, Mansfield v. Neff, 43 Utah 258, 274, 275, 134 Pac. 1160.

[14] 1917, Schneider v. Kloepple, 270 Mo. 389, 398, 193 S. W. 834, 837.

[15] 1871, Grimes v. Harmon, 35 Ind. 198, 221, 9 Am. Rep. 690.

[16] 1856, Owens v. Missionary Society of M. E. Church, 14 N. Y. (4 Kern) 380, 386, 67 Am. Dec. 160.

been said that, if a charitable purpose were to be inferred from the name of such a society, an association of gamblers might assume such a name.[17] An absolute gift to such a society has, therefore, been held to be too indefinite to be enforced as a charity since it may cover charitable as well as non-charitable purposes.[18] A donation to an unincorporated society by name has been held to be absolute, and has not been allowed to be limited by a reference to the rules by which the organization is bound together.[19]

§ 370. **Absolute Gift to unincorporated Society as a Charity. Majority Rule.** The great weight of authority, however, points the other way. What induces testators to execute gifts in favor of unincorporated charitable associations is unquestionably the charitable nature of the work which they are doing. There is every reason, therefore, why the court should hold such gifts, though they are absolute in form, to be charitable in fact.[20] Extrinsic evidence may establish the charitable nature of such donations and is admissible to identify the legatee, and the identification of certain legatees necessarily characterizes legacies as charitable.[1] The very name of certain organizations indicates clearly that their general purposes are charitable.[2] Where the purposes of such societies under their present mode of existence give them no power to devote property to other than charitable uses, it is impossible for them, while they continue to be what they are, to expend their property for any other than charitable purposes. It follows that an absolute gift to them constitutes a charity. It is the design of the donor to consecrate his gift to the legitimate purposes of the society. His intent is as clearly manifested as it would be had he expressly declared that it should be applied to the very uses

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17 1853, Chittenden v. Chittenden 1 Am. Law. Reg. (O. S.) 538, 542 (N. Y.); 1856, Owens v. Missionary Society, 14 N. Y. 380, 385, 67 Am. Dec. 160.

18 1890, Rhodes v. Rhodes, 88 Tenn. (4 Pickle) 637, 645, 13 S. W. 590.

19 1907, Guild v. Allen, 28 R. I. 430, 435, 67 Atl. 855.

20 1851, Carter v. Balfour, 19 Ala. 814, 824, 825; 1901, In re Winchester, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281; 1845, Washburn v. Sewell, 50 Mass. (9 Met.) 280; 1876, American Tract Society v. Atwater, 30 Ohio St. 77, 88, 27 Am. Rep. 422.

1 1916, Eccles v. Rhode Island Hospital Trust Co., 90 Conn. 592, 98 Atl. 129, 132.

2 1901, Mason v. Perry, 22 R. I. 475, 478, 48 Atl. 671.

for which the association exists.[3] A gift to a charitable or religious organization, without more, is, therefore, in trust for the purposes of the organization and **ex vi termini** is a donation to charity.[4] Such a bequest to a church sufficiently indicates that it is for religious purposes.[5] Where a testator, therefore, is a member of an unincorporated foreign mission school and makes a bequest directly to it without indicating any specific purpose, the court, under the power possessed by courts of chancery before the statute of Elizabeth, will determine the purposes and objects of the donor from the fundamental articles of association, and will thereupon carry the gift into effect.[6]

§ 371. **What is an unincorporated Society? Trustees unnecessary.** Not everything, of course, will pass muster as an unincorporated society. An anti-saloon league, organized at a church meeting to do work at a coming election, which has held no other meetings, has elected no officers and has made no provision for subsequent meetings, cannot take a charitable gift.[7] To be entitled to take, the association must have some sort of an organization and some sort of a collective name.[8] Provided that this is the case, the society may take a gift and discharge the executors from liability,[9] though its members are scattered over many states.[10] The objection that there is no definite trustee of such a trust is overcome either by holding that the heirs are such trustees,[11] or by the appointment on the part of the court of trustees.[12]

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[3] 1860, Appeal of Evangelical Association, 35 Pa. (11 Casey) 316, 320, 321.

[4] 1912, Glover v. Baker, 76 N. H. 393, 402, 83 Atl. 916; 1913, In re Douglas (Royer v. Potter), 94 Neb. 280, 284, 143 N. W. 299, Ann. Cas. 1914, D. 447; 1864, In re Ticknor, 13 Mich. 44, 54.

[5] 1912, Crim v. Williamson, 180 Ala. 179, 182, 60 So. 293.

[6] 1837, King v. Woodhull, 3 Edw. Ch. 79, 93 (N. Y.).

[7] 1915, Volunteers of America v. Peirce, 267 Ill. 406, 108 N. E. 318 (reversing 187 Ill. App. 428)

[8] 1875, Cruse v. Axtell, 50 Ind. 49, 57; 1888, Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 8 S. W. 346; 1899, Chambers v. Higgins, 20 Ky. Law. Rep. 1425, 49 S. W. 436. The Iowa State College of Agriculture and Mechanic Arts, therefore, cannot take, having no existence separate from the state. 1907, Catt v. Catt, 103 N. Y. Supp. 740, 118 App. Div. 742.

[9] 1844, Parker v. Cowell, 16 N. H. 149, 156.

[10] 1860, Appeal of Evangelical Association, 35 Pa. (11 Casey) 316, 320.

[11] 1842, Bartlett v. Nye, 45 Mass. (4 Met.) 378.

[12] 1916, Eccles v. Rhode Island Trust Co. 90 Conn. 592, 98 Atl. 129, 132; 1857, First Universalist Society v. Fitch, 74 Mass. (8 Gray) 421.

"When there is a devise of real estate to a church or society incapable of taking the legal title simply because of not being incorporated, the devise is not void, and the estate devised does not descend unincumbered to the heirs, but a trust is created for the benefit of the church, and the legal title devolves upon the heirs charged with the trust, which they will be required to execute; or a court of equity will appoint a trustee to execute the trust until the society becomes incorporated and acquires capacity to hold the legal title."[13]

§ 372. **Unincorporated Society as a Quasi Corporation.** In a few states there are statutes under which religious societies, which have done nothing but organize, are recognized as quasi corporations for the purpose of taking and holding real or personal property, or both. Such a statute is passed to facilitate the taking by them of charitable bequests,[14] and does away with any doubt as to their right to acquire property. It has, therefore, been held in North Carolina that a bequest to an unincorporated church is valid where the associates have availed themselves of the mode provided by the legislature by which such societies may hold property.[15] The extent to which such holding will be allowed to go will, of course, depend upon the terms of the statute under which the question arises. Thus the Tennessee statute enables unincorporated religious societies to take land for purposes of public worship, but not for a parsonage or a library,[16] and does not empower them to take personal property.[17]

§ 373. **Unincorporated Society as a Partnership.** The South Carolina court has attempted to solve the difficulties which attend a gift to an unincorporated society by holding that the individuals which compose it may be identified and take as natural persons in the same manner as if each had been particularly named.[18] It would follow that such a

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[13] 1883, Byers v. McCartney, 62 Iowa 339, 341, 342, 17 N. W. 571.

[14] 1863, Newmarket v. Smart, 45 N. H. 87, 99. See 1825, Anderson v. Brock, 3 Me. 243, 247.

[15] 1849, Kirkpatrick v. Rogers, 41 N. C. (6 Ired. Eq.) 130, 135.

[16] 1880, Reeves v. Reeves, 73 Tenn. (5 Lea) 644, 649; 1892, Nance v. Busby, 91 Tenn. (7 Pickle) 303, 315, 18 S. W. 874, 15 L. R. A. 801.

[17] 1890, Rhodes v. Rhodes, 88 Tenn. (4 Pickle) 637, 641, 13 S. W. 590.

[18] 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 106, 1 Rich. Law 176 note (S. C.).

society may take a charitable gift, its members acting as individuals.[19] This solution of the difficulty has not found favor with the other courts,[20] and is not adequate. It transfuses the purely commercial conception of a partnership into charitable associations, and necessarily results in incongruities easily imagined, but too numerous to mention. It breaks down completely as applied to the larger associations and cannot, therefore, be considered as a solution of the problem.

§ 374. **Incorporation of Society after a Gift is effective.** Unincorporated charitable societies, on finding that they have been made the beneficiaries of a gift, frequently procure a charter of incorporation. This step, of course, is advisable for various obvious reasons, but does not substantially change the legal situation. The validity of a charitable gift, except in the case of a future estate,[1] must be determined as of the date of the death of the testator.[2] The capacity of an unincorporated society to take, cannot be enlarged after the death of a donor so far at least as his particular gift is concerned.[3] "The charity must stand or fall, as it was found to exist at the death of the testator. If it were not then legal and valid, no subsequent statute of the legislature can make it good."[4] That a gift is somewhat obscure and irrational is not enough unless it is without any clear meaning.[5] A charitable devise, void because the beneficiary is not incorporated is, therefore, not validated by its subsequent incorporation.[6] The corporate successor of a voluntary society, however, will be entitled to the gift where it is valid in the first instance,[7] but must

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[19] 1897, Dye v. Beaver Creek Church, 48 S. C. 444, 455, 26 S. E. 717, 59 Am. St. Rep. 724.

[20] 1895, In re Owens, 33 N. Y. Supp. 422, 24 N. Y. Civ. Proc. Rep. 256, 1 Gibbons 235, 67 N. Y. St. Rep. 411 (appeal dismissed 12 Misc. Rep. 656, 33 N. Y. Supp. 1131, 66 N. Y. St. Rep. 872).

[1] 1885, Shipman v. Rollins, 98 N. Y. 311, 327, 15 Abb. N. C. 288.

[2] 1916, Ely v. Meegie, 219 N. Y. 112, 113 N. E. 800, 806.

[3] 1890, Rhodes v. Rhodes, 88 Tenn. (4 Pickle) 637, 640, 13 S. W. 590.

[4] 1844, Green v. Allen, 24 Tenn. (5 Humph) 170, 209; 1855, Wilderman v. Baltimore, 8 Md. 551.

[5] 1920, Jones v. Dorchester, 244 S. W. 596 (Tex. Civ. App.).

[6] 1856, Ruth v. Oberbrunner, 40 Wis. 238, 266; 1921, In re Anderson, 269 Pa. 535, 112 Atl. 766.

[7] 1901, In re Winchester, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281. But see 1884, Catholic Church v. Tobbein, 82 Mo. 418. This decision was doubted 1890, Lilly v. Tobbein 103 Mo. 477, 488, 15 S. W. 618, 23 Am. St. Rep. 887.

be an actual successor. Where, therefore, a gift is void because it is made to a league which has no existence in fact, the incorporation of such a league after the testator's death is ineffective to make the gift valid.[8]

§ 375. **Summary. Minority Group of States.** The question concerning the necessary definiteness of charitable trusts is a difficult one as applied to any one jurisdiction. When, however, all the jurisdictions are considered, it assumes monumental proportions. A clear distinction must be made to start with between states which have abolished and states which retain the English charity rule. In the jurisdictions which have abolished such English rule, the only means of creating a charity is by a gift to a charitable corporation **in esse,** or in contemplation, or by a gift **inter vivos.** Such states comprise Virginia, West Virginia, Maryland, Minnesota, Wisconsin, Michigan and New York. In regard to the last three, however, a revolutionary change of policy has taken place within living memory, while the remaining four have made only minor changes looking toward the reëstablishment of the English charity rule. In judging of the validity of charitable gifts in such states, the local statutes and local decisions must, therefore, be examined with great care.

§ 376. **Summary. Majority Group of States.** In the remaining states much greater liberality is indulged in. While the subject of a charitable gift must be certain or capable of being made certain; while the object of the donor must be described sufficiently to be understood and carried out by the courts, the individual ultimate beneficiaries are and must in the very nature of things be shifting, uncertain and fluctuating if a charitable trust in the true technical sense is to come into existence. It is for the very reason that such beneficiaries are uncertain that charitable as distinguished from private trusts have grown up and have received recognition.

§ 377. **Summary. Unincorporated Society.** The question, whether a gift to an unincorporated charitable society creates a valid charity, has been much agitated and has given

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[8] 1915, Volunteers of America v. Peirce, 267 Ill. 406, 413, 108 N. E. 318 (Reversing 187 Ill. App. 428).

rise to a severe conflict of the authorities. In New York, such gifts, after being held to be valid in the earlier decisions, were held to be invalid when the state changed its policy in the middle of the nineteenth century. To-day, under the Tilden act of 1893 and its amendments, they are still invalid if they are made direct to the society, but will be sustained if made to a trustee for it. The United States Supreme Court, in 1819, held such a gift to be void. This decision for a time exercised a considerable influence, not only in the states which abolished the English charity doctrine, but also in cases arising in other jurisdictions at an early date. This influence, however, has now worn away and the situation has been clarified. While unincorporated societies cannot take such a gift in such states as have drifted away from the English charity doctrine, they are now universally held to be capable of so taking in all the other states. The design of the donor to consecrate his bounty to the charitable purposes of such a society is as clear as it is in regard to a corporation donee, and this purpose will be carried out by the courts.

CHAPTER X

DISCRETION

§ 387. **Adaptability. Necessity.** A certain adaptability of charitable foundations is their very salt and savour and absolutely necessary to preserve them from corruption. The donor cannot foresee what is good for the future as well as his trustees can know what is adapted to the present. The English reports contain numerous instances demonstrating the fact that founders, who thought that they had provided for everything, had been very shortsighted. Schemes, which are wise as applied to one age, are absurd as applied to another. Elaborate machines, devised to carry donations through the ages, have broken down completely in the course of a very few years. Cast-iron appropriations for charitable purposes, no matter how wise and benevolent at the time, are apt to become curses instead of blessings. To accomplish, by such means, a charitable design reaching far into the future, the donor must be a prophet as well as a philanthropist. Where he is very specific, his directions, even at the time of his gift, may not be capable of being carried out without much waste and actual mischief. But, even where they are excellently fitted to the times, a change in circumstances may convert wise plans for legitimate charity into instruments of mischief and pauperization. The spectacle of large charitable funds creating no scandal, but thoroughly well administered by each generation for its own best interests, has a far greater influence to induce noble and reasonable minds to give freely than the sight of charities weighted down with conditions and restrictions, painfully struggling toward their goal, and oftentimes proving to be more like the gift of the malignant spirit of which the fairy tells us than like the charity which the Apostle Paul extols.

§ 388. **Danger of Minuteness of Directions.** The difficulty will be largely solved if donors can be made to realize that all that they can reasonably do is to lay down the general policy of their charity, leaving its administrative details to the discretion of the trustees who from time to time may

administer it. All institutions which survive in this rapidly progressing age must, of necessity, make many changes.[1] The absolute absurdity of attempting to regulate a charity by minute directions is illustrated by a college charity founded in England while the breed of sheep then in the island was very small and inferior. In an effort to secure for the pupils of his school the best mutton on the market, the testator minutely prescribed the weight of the carcasses to be bought by the college authorities. This worked well enough until, by the introduction of the Merino sheep, the size of sheep carcasses on the market was so increased that only the culls could meet the requirements laid down by the testator. The result was that, instead of eating the finest mutton, as the testator had intended, the pupils of the school were supplied with the poorest.

§ 389. **Administrative Details.** No legal difficulties are in the way of making charities effective by delegating discretion as to administrative details. What a testator can do by himself or his agent while alive, he can do by his executor or trustee after his death. Since he might have given the property absolutely to the executors, there is no reason why he may not invest them with discretionary powers for so beneficent an end.[2] "In all cases of charities founded by wills, broad discretion and ample powers must necessarily be conferred upon the trustees, inasmuch as the testator is attempting to provide for contingencies which will arise after his own death."[3] He may, therefore, vest in his executor a wide latitude to exercise his own best judgment in carrying out his gift.[4] His will "may be ascertained by the acts of those to whom he has entrusted discretion and power. Such acts may be justly regarded as the definite expression of his own purpose."[5] A gift to trustees for the establishment of a girls' school at a certain place, therefore, is not void because the question, whether the institution is to be elementary or advanced, general or special, sectarian or non-sectarian,

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[1] 1911, Louis v. Gaillard, 61 Fla. 819, 842, 56 So. 281.

[2] 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 130, 9 Am. Dec. 619.

[3] 1893, Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 568, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

[4] 1909, Hagen v. Sacrison, 19 N. D. 160, 179, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[5] 1861, Beekman v. Bonsor, 23 N. Y. 298, 80 Am. Dec. 269.

is left to their discretion.[6] A similar gift to a church to be organized is valid, though the trustees have no power to create the beneficiary, and though the equitable title for a time will necessarily be in abeyance.[7] A donation of $25,000 to $35,000 for a chapel is not void, though the exact sum to be expended within the limits outlined is left to the trustees.[8] Similarly, the selection of the site of a monument may be left to the discretion of a town.[9] Even though a power given to the trustees to select the beneficiaries out of a class is void, the gift itself, being the principal thing, may be valid.[10]

§ 390. **Administrative Details. Implied Discretion.** Such discretion need not be conferred in express terms, but can and often is implied from the general nature of the trust.[11] "When an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intentment of law, comprised in such grant of power."[12] A gift for one of two charities[13] impliedly gives power to select the charity to be benefited. A direction to build a schoolhouse at a cost not exceeding $10,000 confers discretion on the trustees as to the cost of the building, provided that such cost does not exceed the sum named.[14] A provision that not more than one-half of a gift is to be used up in the donor's lifetime confers power to exhaust the fund after he is dead.[15] A donation to a congregation for cemetery purposes,[16] or to

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[6] 1915, Butterworth v. Keeler, 154 N. Y. Supp. 744, 169 App. Div. 136 (Affirmed 219 N. Y. 446, 114 N. E. 803).

[7] 1856, Miller v. Chittenden, 2 Iowa (2 Clarke) 315, 376, 377, s. c. 4 Iowa 252.

[8] 1918, Lightfoot v. Poindexter, 199 S. W. 1152, 1165 (Tex. Civ. App.).

[9] 1918, Lawrence v. Prosser, 89 N. J. Eq. 248, 104 Atl. 772.

[10] 1869, Miller v. Atkinson, 63 N. C. 537, 540.

[11] 1848, Pickering v. Shotwell, 10 Pa. (10 Barr) 23, 28.

[12] 1882, Hesketh v. Murphy, 36 N. J. Eq. (9 Stew.) 304, 310 (Affirming 35 N. J. Eq. (8 Stew.) 23).

[13] 1891, New Haven Young Men's Institute v. New Haven, 60 Conn. 32, 22 Atl. 447; 1848, Pickering v. Shotwell, 10 Pa. (10 Barr.) 23, 28. A gift for a "tabernacle" or "coliseum", to be erected at a public park according to plans to be made by certain persons, is not void because of the difference between a tabernacle and coliseum. 1918, Lightfoot v. Poindexter, 199 S. W. 1152, 1164 (Tex. Civ. App.).

[14] 1899, Keith v. Scales, 124 N. C. 497, 511, 32 S. E. 809.

[15] 1920, Atkinson v. Union Presbyterian Board of Publication, 266 Pa. 47; 109 Atl. 597.

[16] 1903, Congregation Shaarai Shomayim v. Moss, 22 Pa. Super. Ct. 356.

a bishop for a church in his archbishopric,[17] vests discretion in the trustee as to the details. A bequest to be invested in such manner as will best provide for the charity contemplated confers power on the trustees to decide what is the best means of investment.[18] A charity, couched in general terms, gives discretion to the trustees to carry it out in one of several modes, all of which are within the general terms.[19] A grant to trustees for the purpose of "defraying the expenses of maintaining a minister and public worship" gives the trustees authority to expend a reasonable sum in the payment of the sexton and for fuel.[20] A trust for the suppression of the manufacture, sale or use of intoxicating liquor leaves it in the discretion of the trustees to seek to accomplish such object by the distribution of documents, by lectures, or by other reasonable and appropriate means.[21] A donation to a town, to be invested in United States flags so that its inhabitants may be reminded of their bounden duty, impliedly authorizes the use of part of such income for the purchase of flagstaffs, ropes and other necessary paraphernalia.[1] It is hornbook doctrine that, whether a charity is to be extended to any particular individual who claims to come within its terms, is a matter of discretion with the trustees and is not a matter of contract.[2] However uncertain, indefinite and vague, therefore, those beneficiaries may be, if a general charitable intent appears and trustees are appointed and given discretion in selecting the beneficiaries, and have full power to reduce the general intent to a specific and practical operation, the trust is valid.[3] The power to select the beneficiaries is essential in a charitable trust, for where they are actually determined by the testator himself, his gift ceases to be a public charity. Such a power, indeed, may be more or less clearly conferred in express terms by directing the trustees to make payments from time to time

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[17] 1911, Smith v. Gardiner, 36 App. D. C. 485, 487.

[18] 1902, Eliot's Appeal, 74 Conn. 586, 607, 51 Atl. 558.

[19] 1885, Pierce v. Weaver, 65 Tex. 44, 49.

[20] 1874, Attorney General v. Union Society of Worcester, 116 Mass. 167.

[21] 1881, Haines v. Allen, 78 Ind. 100, 102, 41 Am. Rep. 555.

[1] 1873, Sargent v. Cornish, 54 N. H. 18.

[2] 1863, Russell v. Providence 7 R. I. 566, 575.

[3] 1881, In re Hinkley, 58 Cal. 457, 513, 514.

to such of the beneficiaries as they "in their best judgment and discretion" may determine,[4] or by authorizing them to devise and promulgate such rules and regulations as they shall deem proper for the government of the institution contemplated,[5] or by requesting them to manage the estate "for the purpose of carrying out the full terms,"[6] or by declaring that they are to be the judges of what is necessary,[7] or by asking them to do the business without compensation,[8] or merely by referring them to the rules and regulations of a corporation to be organized.[9] It, however, need not be thus conferred, but may be inferred from the tenor of the entire instrument and the general scheme. Under a gift for the purpose of establishing, building and equipping a public hospital, the trustees have implied power to devise a scheme to carry out the trust, and may organize an executive force to operate and manage the institution, and take into consideration the size of the community, its health and needs, the proximity of similar institutions, and leave a fund for operating purposes.[10]

§ 391. **Power to select Beneficiaries.** What has just been said applies particularly to the selection of the beneficiaries out of a class created by the testator of the will,[11] and may be vested in a trustee appointed by the court.[12] The dependency of a charitable gift on a life estate does not prevent the exercise of such discretion during the existence of the life estate.[13] Since the power to dispense a charity implies the power of selecting its beneficiaries,[14] the mere ap-

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[4] 1897, In re Strong, 68 Conn. 527, 532, 37 Atl. 395.

[5] 1902, Clayton v. Hallett, 30 Colo. 231, 261, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117.

[6] 1906, Tincher v. Arnold, 147 Fed. 665, 671 672, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[7] 1894, Rush County v. Dinwiddie, 139 Ind. 128, 135, 37 N. E. 795.

[8] 1883, Sowers v. Cyrenius, 39 Ohio St. 29, 35, 36, 48 Am. Rep. 418.

[9] 1884, Coit v. Comstock, 51 Conn. 352, 379, 50 Am. Rep. 29. Followed 1885, Appeal of Tappan, 52 Conn. 412.

[10] 1922, Harter v. Johnson—122 S. C. 96, 115 S. E. 217.

[11] 1906, Hunt v. Edgerton, 29 Ohio Cir. Ct. Rep. 377, 385, 19 Ohio Cir. Ct. Dec. 377 (affirmed 75 Ohio St. 594, 80 N. E. 1126); 1893, Woodruff v. Marsh, 63 Conn. 125, 128, 26 Atl. 846, 38 Am. St. Rep. 346.

[12] 1913, Hitchcock v. Board of Home Missions, 259 Ill. 288, 102 N. E. 741 (Reversing 175 Ill. App. 87).

[13] 1907, Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

[14] 1906, Trenton Society v. Howell, 63 Atl. 1110 (N. J.).

pointment of trustees[15] gives them, without special delegation, incidental authority to select from the classes named the individuals to be benefited.[16] A bequest for "worthy and needy servant girls, and the widows and orphans of deceased sailors and fishermen, who are not a public charge,"[17] a donation for the establishment of a home,[18] a charity for the support of the gospel among the colored people of two cities,[19] a provision for the education of colored children, both male and female,[20] a gift to a seaman's aid society to aid destitute seamen,[1] or to trustees for a library or asylum,[2] or for the purpose of helping to educate poor Catholic children[3] have, therefore, been held to impliedly confer the power to select the particular beneficiaries on the trustees.

§ 392. **Parol Directions invalid.** The discretion thus confided to a trustee, however, must be an actual discretion limited, if at all, by the terms of the will[4] and not by vague references to previous or subsequent verbal directions given by the testator. A gift, which attempts to limit such discretion by verbal instructions given,[5] wishes uttered,[6] explanations made,[7] or views expressed[8] by the testator previous

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[15] 1902, Clayton v. Hallett, 30 Colo. 231, 261, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; 1860, Chambers v. St. Louis, 29 Mo. 543, 590; 1878, Clement v. Hyde, 50 Vt. 716, 721, 28 Am. Rep. 522; 1879, Dodge v. Williams, 46 Wis. 70, 98, 50 N. W. 1103, 1 N. W. 92.

[16] 1906, Hunt v. Edgerton, 29 Ohio Cir. Ct. Rep. 377, 385, 19 Ohio Cir. Ct. Dec. 377 (Affirmed 75 Ohio St. 594. 80 N. E. 1126); 1882, Hesketh v. Murphy, 36 N. J. Eq. (9 Stew.) 304 (Affirming 35 N. J. Eq. (8 Stew.) 23).

[17] 1908, In re Nilson, 81 Neb. 809, 116 N. W. 971; 1919, Smith v. Pond, —N. J. Eq.—, 107 Atl. 800.

[18] 1902, Coleman v. O'Leary, 114 Ky. 388, 316, 317, 24 Ky. Law Rep. 1248, 70 S. W. 1068; 1909, Hagen v. Sacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[19] 1864, Pulpress v. African M. E. Church, 48 Pa. (12 Wright) 204.

[20] 1882, Erskine v. Whitehead, 84 Ind. 357, 369.

[1] 1902, Eliot's Appeal, 74 Conn. 586, 598, 51 Atl. 558.

[2] 1899, Duggan v. Slocum, 92 Fed. 806, 34 C. C. A. 676 (Affirming 83 Fed. 244).

[3] 1906, McDonald v. Shaw, 81 Ark. 235, 98 S. W. 952.

[4] 1917, Howard v. Howard, 227 Mass. 395, 116 N. E. 940.

[5] 1911, Wilcox v. Attorney General, 207 Mass. 198, 93 N. E. 599, Ann. Cas. 1912A, 833; 1914, Moore v. O'Leary, 180 Mich. 261, 267, 146 N. W. 661, Ann. Cas. 1916A, 373.

[6] 1881, Olliffe v. Wells, 130 Mass. 221.

[7] 1876, Schmucker v. Reel, 61 Mo. 592; 1918, Blunt v. Taylor, 230 Mass. 303, 119, N. E. 954.

[8] 1900, Trinity Methodist

to the making of the will, or by plans made,[9] or directions given,[10] or wishes uttered[11] by him subsequently thereto, is void and of no effect. A different situation exists where an existing writing is referred to. In such a case, though such writing has not been admitted to probate, it will, nevertheless, be treated by the courts as a collection of hints to assist the trustees in the exercise of their discretion without controlling it.[12] The mere fact, however, that testator states that his executor is familiar with all his plans will not avoid the charity.[13] In such case, his full knowledge of the donor's purposes and inclinations does not control his judgment,[14] but leaves him at complete liberty to avail himself of the judgment and wishes of the testator.[15] A discretion, honestly and conscientiously exercised by the trustee in selecting the site of the proposed library under a power conferred by the will, will, therefore, not be controlled by the courts, because the decision reached coincides with the views of the testator verbally expressed by him and is in accord with a promise then made to him.[16]

§ 393. **Limits of Discretion.** The discretion, however, must be confined to a discretion vested expressly or impliedly in the trustees. Where a fund is given for a charity, and the duty to name the beneficiaries is imposed on the trustees, such trustees have no discretionary power to pay or not to pay such legacy, but their discretion is confined to the selection of the beneficiaries.[17] While they may, in the case of a gift for the education of Baptist ministers, employ to some extent non-Baptist teachers;[18] while a hospital, under a dona-

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Episcopal Church South v. Baker, 91 Md. 539, 566, 46 Atl. 1020.

[9] 1895, Smith v. Smith, 54 N. J. Eq. (9 Dick.) 1, 32 Atl. 1069 (Affirmed 55 N. J. Eq. 821, 41 Atl. 1116).

[10] 1904, Colbert v. Speer, 24 App. D. C. 187, 210 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403).

[11] 1881, Olliffe v. Wells, 130 Mass. 221.

[12] 1844, In re Grandom, 6 Watts and S. 537, 550, 551 (Pa.).

[13] 1915, Johnson v. Bowen, 85 N. J. Eq. 76, 83, 95 Atl. 370; 1919, Coffin v. Attorney General, 231 Mass. 579, 121 N. E. 397.

[14] 1916, In re Groot, 159 N. Y. Supp. 1003, 173 App. Div. 436 (Affirmed 226 N. Y. 576).

[15] 1907, Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

[16] 1873, Appeal of Williams, 73 Pa. (23 P. F. Smith) 249.

[17] 1907, Godfrey v. Hutchins, 28 R. I. 517, 521, 68 Atl. 317.

[18] 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 218.

tion for the purpose of benefiting as many poor people as possible, may choose not to maintain a contagious ward;[19] while corporations may be selected as recipients of the charity,[20] the managers of charitable trusts cannot turn the trust property over to another person or association. "They must use it for the purposes intended, but may exercise a discretion as to the manner and means by which that is to be accomplished."[1]

§ 394. **Non-charitable Purpose. Discretion invalid.** Since the favor bestowed upon charitable donations is confined to such gifts, it follows irresistibly that no discretion can be validly given to trustees to apply or not to apply the gift to a charitable purpose. Their discretion must be restricted to a purpose which is charitable in the technical meaning of the word, and will be unavailing if, by any possibility, it can be exercised outside of the limits of that definition.[2] "In order that a gift or devise to charity should possess that certainty which will give it validity, the language employed must require that the fund be expended for some charity according to the legal significance of that word, and for nothing else. If the language of the gift or devise leaves to the trustees a **discretion** to expend the fund for a purpose non-charitable or for purposes partly charitable and partly non-charitable, it will not be upheld. In such case the trustee **may** expend the whole fund for a purpose which is not charitable, and at the same time execute the exact power given him under the will."[3] Equity is powerless to compel the trustee to exercise his discretion favorably to the lawful use as against the direction of the donor that he may exercise it in favor of a use not countenanced by law; and equity itself is equally powerless to apply the trust to the lawful use in the face of the donor's intention that it may be applied to one not lawful.[4] Where, therefore, a gift is for a purpose of liberality or benevolence, or private charity,

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[19] 1905, Stearns v. Newport Hospital, 27 R. I. 309, 318, 62 Atl. 132.

[20] 1868, Marsh v. Renton, 99 Mass. 132.

[1] 1885, Pierce v. Weaver, 65 Tex. 44, 50.

[2] 1884, In re Kinike, 11 Pa. Co. Ct. Rep. 232 (Affirmed 155 Pa. 101, 25 Atl. 1016); 1871, Grimes v. Harmon, 35 Ind. 198, 252, 9 Am. Rep. 690.

[3] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 377.

[4] 1919, Smith v. Pond, 90 N. J. Eq. 445, 107 Atl. 800.

and is of a nature so general and undefined as to be incapable of being executed by the court, it fails altogether and goes to the heirs or the next of kin.[5] When it is so given that it may or may not be used for charity, or may or may not be used for a charitable object of a public character without violating the directions of the will, the case is not one for enforcing the gift.[6] Wherever a clear discretion or choice to act or not to act is given; wherever the trustees have the option to withdraw the funds from the purposes of the trust and apply them in their own discretion, the court cannot execute the trust.[7] Nor will a clear intention to vest the trustees with a discretion to select a non-charitable object be controlled by a subsequent assignment of reasons, or subsequent ambiguous words, or by inferences and arguments from the other parts of the will. Where, therefore, such a discretion has been sought to be bestowed, a devise to an undoubted charity, provided that the trustees "shall be unwilling or deem it inexpedient to organize a new charity," is invalid, since the testator has sought to put it in their power to devote the property to purposes not charitable.[8]

§ 395. **Illustrations of Non-charitable Objects.** The reported cases furnish many striking illustrations of this principle. A gift to a trustee, to be used and expended "for the promotion of the religious, moral, and social welfare of the people in any locality," is void, since the social welfare may be promoted by such commercial ventures as railroads, steamships and the like.[9] Similarly, donations, which may be devoted by the trustees to the encouragement of abstract scientific discoveries which do not benefit mankind,[10] or to institutions of learning which are commercial,[11] or to the donor's brothers and sisters,[12] or to such charitable or other

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[5] 1876, Schmucker v. Reel, 61 Mo. 592, 596.

[6] 1873, Attorney General v. Soule, 28 Mich. 153, 156; 1917, Bills v. Pease, 116 Me. 98, 100 Atl. 146.

[7] 1913, Burke v. Burke, 259 Ill. 262, 267, 268, 102 N. E. 293.

[8] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 382, 384.

[9] 1896, Livesey v. Jones, 55 N. J. Eq. 204, 35 Atl. 1064 (Affirmed 56 N. J. Eq. 453, 41 Atl. 1115).

[10] 1909, In re Sutro, 155 Cal. 727, 102 Pac. 920.

[11] 1909, In re Sutro, supra; 1873, Attorney General v. Soule, 28 Mich. 153; 1908, In re Shattuck, 193 N. Y. 446, 86 N. E. 455.

[12] 1923, Slattery v. Ward —— R. I. ——, 119 Atl. 755.

purposes as they may deem advisable,[13] or to such worthy persons and objects as they may deem proper,[14] or to such persons, societies, or institutions as they may consider to be most deserving,[15] or to the endowment of such charitable or **other** institutions as in their discretion are most needed and will do the most positive and enduring good and the least harm,[16] or to educational or other public purposes,[17] have been declared void. A trust which can, under the terms of its creation, be used for purposes not strictly charitable, or partly for purposes charitable and partly not charitable, is invalid.[18] It is clear that a fund bequeathed to a lodge "for the relief of needy members of said Mount Vernon lodge, or, **preferably** (this word was underlined in the will) for the general purposes of the lodge, including now and then, if desired, an appropriation for proper forms of entertainment for the members of the lodge," is not limited to charitable objects.[19] The same is true of a gift "for the foundation of a universal journal, or of any other enterprise which shall have for its purpose the betterment and improvement of the conditions of suffering mankind in general or in particular."[20] On the other hand, a bequest for the erection of church buildings of certain prescribed denominations within a certain area gives the trustees power to select the beneficiaries within the limits defined, but bestows no power to apply the gift to non-charitable objects, and hence is valid.[21] The same is true of a discretion to apply funds to the use and benefit of a town in such a manner as the trustees shall determine.[22]

§ 396. **Void Discretion. Trustees cannot validate.** The fact that the trustees authorized by the terms of the will to select non-charitable objects have, in fact, confined their selection strictly within the limits of charity is immaterial.

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[13] 1902, Hyde v. Hyde, 64 N. J. Eq. 6, 53 Atl. 593.

[14] 1885, Bristol v. Bristol, 53 Conn. 242, 5 Atl. 687.

[15] 1881, Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445.

[16] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368.

[17] 1922, Castle v. Castle, 281 Fed. 609 (Hawaii).

[18] 1923, Kitchen v. Pitney, — — N. J. ——, 119 Atl. 675.

[19] 1901, Mason v. Perry, 22 R. I. 475, 48 Atl. 671.

[20] 1919, **In re** Tactkian, 179 N. Y. Supp. 188, 107 Misc. 519.

[21] 1900, Trafton v. Black, 187 Ill. 36, 58 N. E. 292.

[22] 1920, Peirce v. Attwill, 234 Mass. 389, 125 N. E. 609.

The validity of a power depends upon its nature, not upon its execution.[23] The question is not whether the trustees may apply a gift to charity, but whether they must so apply it.[24] A gift too vague to be valid cannot, therefore, be made good by any action taken by the trustees, however honorable their motives.[25] What has been done under a will is in a legal sense immaterial where the power itself is unauthorized.[1]

§ 397. **Construction of Word Charity.** The words "charitable" and "charity" have, since the passage of the statute of Elizabeth, assumed a fixed and definite meaning which will be applied to them whenever a testator uses them.[2] Accordingly, a gift to "the charitable institution hereinafter mentioned, or such other charitable institution as my executor shall designate," has been upheld on the ground that the purpose is confined to legal charities.[3] The word "charity" will not be given an unusual meaning so as to defeat a gift.[4] In consonance with the rule of liberal construction applied to charitable trusts, whenever such word is used in connection with a number of nouns, it will be construed to qualify them all wherever the context permits such a construction. Gifts to trustees for the "charitable assistance and benefit" of certain young persons,[5] or to "such charitable institutions, persons, or objects" as they may deem to be most worthy,[6] or to "such German charitable institutions and German societies" in Philadelphia as they may select,[7] or to be distributed "among such institutions or to such acts of charity therewith as in their judgment may seem best;[8] have, therefore, been construed in such a way that the word "charitable" was made to qualify all

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[23] 1891, Tilden v. Green, 130 N. Y. 29, 52, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487.

[24] 1876, Adye v. Smith, 44 Conn. 60, 71, 26 Am. Dec. 424.

[25] 1914, Gerick v. Gerick, 158 Ky. 478, 481, 165 S. W. 695.

[1] 1891, Read v. Williams, 125 N. Y. 560, 569, 26 N. E. 730, 21 Am. St. Rep. 748.

[2] 1887, Howe v. Wilson, 91 Mo. 45, 49, 3 S. W. 390, 60 Am. Rep. 226; 1871, Everett v. Carr, 59 Me. 325, 334; 1914, Utica Trust and Deposit Co. v. Thompson, 149 N. Y. Supp. 392, 402, 87 Misc. Rep. 31.

[3] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 385.

[4] 1921, **In re** Anderson, 269 Pa. 535, 112 Atl. 766.

[5] 1884, Appeal of Tappan, 52 Conn. 412, 416.

[6] 1908, Gill v. Attorney General, 197 Mass. 232, 83 N. E. 676.

[7] 1902, **In re** Schleicher, 201 Pa. 612, 51 Atl. 329.

[8] 1921, **In re** Anderson, **supra.**

the nouns with which it was connected, not merely those with whom the connection was immediate. It is thus not only entirely safe to use these words in a will, but their use is the best means of making the charitable intent of the donor clear beyond a doubt. Their use, while advisable, however, is not essential. "If the substance of the object described by the words employed comes within the definition of a charity, as that word is used in equity, then the gift is valid."[9]

§ 398. **Benevolence, Generosity, Liberality, etc.** The use, however, of other words more or less synonymous is not as safe. Instead of strengthening a will, they frequently weaken it. It is quite clear that trusts which are devoted to mere benevolence, or liberality, or generosity, cannot be upheld as charities.[10] Benevolent objects include acts dictated by mere kindness, good will, or a disposition to do good, and are not necessarily charities in the technical and legal sense of the word.[11] Charity in a legal sense must be distinguished from acts of liberality or benevolence. To constitute a charity, the use must be public in its nature.[12] While no absolute or exhaustive definition of either charity or benevolence has ever been formulated, and while the distinction between them is shadowy and evanescent,[13] it can confidently be stated that benevolence covers more ground than charity.[14] Though every charitable purpose is benevolent, every benevolent purpose is not charitable.[15] "Charity means one thing, benevolence quite another. Benevolence includes all acts or gifts prompted by good will or kind feelings, and may be entirely independent of any thought or intention of charity."[16] A bequest for purposes of "religion or benevolence" is, therefore, not a charity if

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[9] 1917, Thorp v. Lund, 227 Mass. 474, 478, 116 N. E. 946, Ann. Cas. 1918 B. 1204.

[10] 1893, Fox v. Gibbs, 86 Me. 87, 94, 29 Atl. 940. See 1884, In re Kinike, 11 Pa. Co. Ct. Rep. 232 (Pa.).

[11] 1873, Chamberlain v. Stearns, 111 Mass. 267.

[12] 1856, Owens v. Missionary Society, 14 N. Y. (4 Kern) 380, 397, 67 Am. Dec. 160.

[13] 1907, In re Dulles, 218 Pa. 162, 167, 67 Atl. 49, 12 L. R. A. (N. S.) 1177.

[14] 1913, Hays v. Harris, 73 W. Va. 17, 23, 80 S. E. 827.

[15] 1876, Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424; 1921, In re Johnson, 100 Or. 142, 196 Pac. 385, 390, 1115.

[16] 1895, People v. Powers, 147 N. Y. 104, 110, 41 N. E. 432, 35 L. R. A. 502.

benevolence is used in its usual meaning. Where, however, such meaning is restricted by the rest of the will, it may be valid.[17] While it has been held that the word "benevolent," standing alone, may have been intended by the testator to mean "charitable,"[18] while it has been declared that the mere fact that the object of testator's bounty is repeatedly called benevolent does not make it non-charitable,[19] trusts merely for benevolent purposes,[20] or benevolent objects,[1] have generally been held to be void by the courts. No surer method of laying the foundation for will contests can, therefore, be adopted than by the use of such similar words in connection with, or independent of, the technical words "charity" and "charitable." Yet, the trend to vicious verboseness is strong, has filled the courts with litigation, and has wrecked the noble dream of many a charitably inclined person. There is no likelihood that such mistakes will be avoided in the future. It becomes important, therefore, to consider the significance of the use of such unnecessary words in wills and other instruments of donation.

§ 399. **Uncertain Meaning of such non-technical Words.** No fixed and definite meaning can be given to any such words. Like other non-technical terms, they are sometimes degraded, sometimes ennobled, sometimes narrowed, sometimes broadened by use. "Benevolence may or may not be charitable in the legal sense. The perplexity comes from the fact that the word is used with different meanings, according to circumstances, it sometimes signifying liberality and generosity, and sometimes charity in the technical sense of the word."[2] Mere recourse to the dictionaries will not be sufficient to solve the difficulties that thus arise. The context must be consulted with great care to determine whether the meaning of the word is to be cut down to legal dimen-

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[17] 1884, Pell v. Mercer, 14 R. I. 412, 442, 443. See also 1921, Hicks v. Providence, 43 R. I. 484, 113 Atl. 791.

[18] 1881, Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334.

[19] 1882, Erskine v. Whitehead, 84 Ind. 357, 369.

[20] 1876, Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424; 1873, Chamberlain v. Stearns, 111 Mass. 267.

[1] 1895, Jones v. Green, 36 S. W. 729 (Tenn.). But see under the Kentucky statute 1883, Given v. Shouse, 5 Ky. Law Rep. 419.

[2] 1893, Fox v. Gibbs, 86 Me. 87, 94, 29 Atl. 940.

sions.[3] In almost all the decisions in which this has been done, there has been something in the rest of the instrument which justifies such an interpretation. Since a latitudinarian interpretation of the words "charitable" and "charity" has been unhesitatingly adopted in order to effectuate the intention of testators, a restricted meaning may well be given with the same point of view to the words "benevolent" and "benevolence."[4] Says the Massachusetts court in regard to the word "philanthropy": "The dominant word is taken to be the one pointing to a charity and the more indefinite word linked with it is held to be narrowed and colored by its context or used as a synonym with it, in order to make effective the main charitable intent."[5] Where, however, the meaning of such a word is clear, judicial astuteness, employed either to uphold or suppress the instrument, is quite out of place. In the absence of any criterion but the naked signification of the terms themselves, the courts can no more say that benevolence has the import of charity and nothing more, because in some of their senses the two words assimilate, than it would be legitimate to adjudge that the number five means four because the two numbers are but a single solitary number apart. Nor does the conjunction of the two words make them identical in meaning, as that would imply that one of the terms would be dispensed with or that the lesser would swallow up the larger. For a court to strike out the broader of the descriptive terms under such circumstances may indeed uphold an occasional will, but cannot but undermine at the same time one of the most important canons established for the construction of written instruments.[6] Whether or not the word is thus restricted, however, is the point on which the parties to will contests will divide. It is the difficulty which the courts must solve. It is a difficulty which could well have been avoided by a proper drafting of the instrument. However, it must be solved and the estate disposed of accordingly.

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[3] 1912, German Corporation v. Negaunee German Aid Society, 172 Mich. 650, 655, 138 N. W. 343.

[4] 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. Y. Eq. (2 Stew.) 36, 50).

[5] 1917, Thorp v. Lund, 227 Mass. 474, 479, 116 N. E. 946, 949, Ann. Cas. 1918, B. 1204.

[6] 1878, De Camp v. Dobbins, supra.

§ 400. **Construction of Non-technical Words.** Since the phraseology used by testators is so various, the ascertainment of their meaning cannot be much aided by precedent. While the linking of such words as "benevolent" and "charitable" by a disjunctive would appear to indicate an intention to make a distinction between them and would result in holding the gift to be void for indefiniteness;[7] while the linking of such words by a conjunctive would have the opposite tendency and would operate to induce the courts to hold these words to have been intended to be synonymous,[8] not much effective guidance can be otherwise gathered from the decided cases. Far more can be achieved by taking the will in question by its four corners and reading every clause of it in connection with every other clause. Every will "must be read as an entirety, in the ascertainment of its meaning. No particular phrase is to be read separately. Each phrase is to be considered in relation to the entire provision, and the general meaning of each phrase restricted by its association; and if there is a main purpose apparent, each phrase is to be subordinated to it."[9] The context not infrequently limits words which otherwise would take a gift far beyond the definition of a charity. Words such as the following, "for any other purpose it may see fit,"[10] "such other financial aid as may seem to them fitting and proper,"[11]

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[7] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368; 1905, Hegeman v. Roome, 70 N. J. Eq. 562, 62 Atl. 392; 1869, Thompson v. Norris, 20 N. J. Eq. (5 C. E. Green) 489, 523 (Affirming 19 N. J. Eq. (4 C. E. Green) 307). Explained, 1919, Smith v. Pond, 90 N. J. Eq. 445, 107 Atl. 800; 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. J. Eq. (2 Stew.) 36, 49). But see 1905, Minot v. Parker, 189 Mass. 176, 179, 75 N. E. 149; 1865, Saltonstall v. Sanders, 93 Mass. (11 Allen) 446.

[8] 1881, In re Hinckley, 58 Cal. 457, 507; 1893, Fox v. Gibbs, 86 Me. 87, 29 Atl. 940; 1882, Suter v. Hilliard, 132 Mass. 412, 42 Am. Rep. 444; 1895, People v. Powers, 147 N. Y. 104, 110, 41 N. E. 432, 35 L. R. A. 502; 1898, In re Murphy, 184 Pa. 310, 39 Atl. 70, 63 Am. St. Rep. 802; 1907, In re Dulles, 218 Pa. 162, 168, 67 Atl. 49, 12 L. R. A. (N. S.) 1177; 1890, Park v. American Home Missionary Society, 62 Vt. 19, 20 Atl. 107. See 1882, Bangor v. Masonic Lodge, 73 Me. 428, 433, 434, 40 Am. Rep. 369. But see 1892, In re Jackson, 20 N. Y. Supp. 380.

[9] 1912, Greer v. Synod Southern Presbyterian Church, 150 Ky. 155, 157, 150 S. W. 16.

[10] 1912, Greer v. Synod Southern Presbyterian Church, supra.

[11] 1911, In re Robinson, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

"anything else whereby the members may be benefited,"[12] do not render a donation void, while a bequest for "such objects and purposes of benevolence and charity, public or private, including educational or charitable institutions and the relief of individual need," creates a valid charitable gift, the last words being construed as specifications within the limits of the dominant phrase.[13] Similarly, a trust in favor of "human beneficence and charity," explained by the testator as intended to foster religion, learning, and charity, creates a valid gift,[14] and a gift to a charitable corporation for its benevolent purposes is valid because the charter of the corporation shows that these purposes are in fact charitable.[15] Though a bequest to moral and useful associations would be too broad, a gift to two designated missionary societies "and to other moral and useful associations" is limited by its context to true charities. The adjectives "moral" and "useful" emphasize the worth of these associations without changing their legal status.[16]

§ 401. **Liberal Construction of Non-technical Words.** The very liberal construction indulged in by courts in order to hold gifts to be valid can very easily be further illustrated. A gift to trustees to "be used for the benefit of worthy institutions and worthy persons," and to be expended for "educational and benevolent purposes" has been upheld.[17] The word "eleemosynary" in the California constitution has been held to cover the whole range of charities.[18] A direction to pay over a certain fund to some hospital to be selected by the trustees has been construed as not authorizing them to increase the dividends of a commercial hospital.[19] A bequest to a trustee for "charitable purposes, masses, etc.," has been construed as not intending by the abbreviation, "etc.," any-

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[12] 1898, Staines v. Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788.

[13] 1894, Weber v. Bryant, 161 Mass. 400, 37 N. E. 203.

[14] 1881, In re Hinckley, 58 Cal. 457, 507.

[15] 1882, Jones v. Habersham, 107 U. S. 174, 184, 27 L. Ed. 401, 2 S. Ct. Rep. 336 (Affirming Fed. Cas. No. 7, 465, 3 Woods 443).

[16] 1921, Prime v. Harmon, 120 Me. 299, 113 Atl. 738, 740.

[17] 1914, Baptist Home of Monroe County v. Gardner, 145 N. Y. Supp. 275.

[18] 1896, People v. Cogswell, 113 Cal. 129, 138, 45 Pac. 270, 35 L. R. A. 269.

[19] 1911, French v. Calkins, 252 Ill. 243, 257, 96 N. E. 877.

thing but charitable objects.[20] A donation to be applied "to the relief of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate," has been sustained, the word "others" being construed to mean others than those aided in past years, not others than the poor and unfortunate.[21] A legacy "in aid of objects and purposes of benevolence or charity, public or private," has been upheld, the words "benevolence or charity" being construed to refer to poor relief only, and the words "public or private" being construed to refer merely to the mode of distribution.[1] A trust to the presiding bishop of the Mormon church to expend the income for the benefit of the members of his church, "whether it be for public schools, parks, watering cities, acclimatizing foreign plants, or anything else whereby the members may be benefited," has been sustained on the ground that the specific purposes mentioned are all of them charitable under the circumstances in which Utah finds itself, and that the last clause is limited by its context to such as are similar to those named expressly.[2] The word "philanthropic" has been held to be nearly, if not quite, synonymous with the word "charity."[3] It has also been held that the fact that trustees and executors are authorized to pay the legal costs and charges against the estate out of the residue which is devised to charity, does not give them a power to expend part of the estate for non-charitable purposes so as to defeat the charity.[4]

§ 402. **Courts will not exercise Trustees' Discretion.** The discretion vested in trustees must be exercised by them

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[20] 1883, Ex Parte Schouler, 134 Mass. 426.

[21] 1889, Bullard v. Chandler, 149 Mass. 532, 539, 21 N. E. 951, 5 L. R. A. 104.

[1] 1865, Saltonstall v. Sanders, 93 Mass. (11 Allen) 446.

[2] 1898, Staines v. Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788.

[3] 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 949, Ann. Cas. 1918, B, 1204. But see 1921, Dirlam v. Morrow, 102 Ohio St. 279, 131 N. E. 365 where the testator, by way of amplification, added to the words "religious and philanthropic work" other language such as "promoting Christian living," "abstinence from liquor and tobacco," "rules of health, thrift and economy."

[4] 1893, Crerar v. Williams, 145 Ill. 625, 651, 34 N. E. 467, 21 L. R. A. 454 (Affirming 44 Ill. App. 497).

and will not ordinarily be interfered with by the courts.[5] "Where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose, in such manner as they may think fit, the executors or trustees, if willing to execute the trust, will not, on a bill being filed for carrying the trust into execution, be deprived of their discretionary power."[6] Neither will they, on the suit of the attorney general, be compelled to furnish any scheme or plan of distribution of the funds of the estate.[7] A discretion vested in them as to the location of a certain monument,[8] as to whether a certain purpose has become unattainable whereupon a secondary trust is to attach,[9] will not be controlled, or delegated to a master.[10] Where, therefore, a donor leaves land to trustees with directions to apply the income to the support of a certain church until it shall have increased so as to answer all his purposes, thereafter to another church, the trustees may, in good faith, determine, undisturbed by the courts, what particular amount is to be paid, and such amount may be less than the entire expenses of the church.[11] Where a testamentary gift is made "upon the express condition" that the devisee, by a will executed before taking, devise so much as shall remain undisposed of or unspent at the time of her decease to such charitable institution as she may select, and the devisee refuses to make the will, the court will not execute the trust until the death of the devisee.[12]

§ 403. **Courts will supervise Trustees' Discretion.** Of course, such discretion is not beyond the restraining power of the courts. "There is no discretion so absolute as to bid defiance to the inspection of the tribunals."[13] It sometimes,

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[5] 1882, Hathaway v. New Baltimore, 48 Mich. 251, 12 N. W. 186; 1914, Baptist Home of Monroe County v. Gardner, 145 N. Y. Supp. 275.

[6] 1865, Drew v. Wakefield, 54 Me. 291, 299.

[7] 1914, Buell v. Gardner, 149 N. Y. Supp. 803 (Affirmed 153 N. Y. Supp. 1108).

[8] 1893, Society of the Cincinnati Appeal, 154 Pa. 621, 637, 26 Atl. 647, 20 L. R. A. 323.

[9] 1910, Larkin v. Wikoff, 75 N. J. Eq. 462, 480, 72 Atl. 98, 79 Atl. 365 (Affirmed 77 N. J. Eq. 589, 78 Atl. 1134, but reversed 79 N. J. Eq. 209, 81 Atl. 365).

[10] 1907, Godfrey v. Hutchins, 28 R. I. 517, 522, 68 Atl. 317.

[11] 1850, Hawes Place Congregational Society v. Hawes Fund, 59 Mass. (5 Cush.) 454.

[12] 1885, Mills v. Newberry, 112 Ill. 123, 1 N. E. 156, 54 Am. Rep. 213.

[13] 1844, In re Grandom, 6 Watts and S. 537, 551 (Pa.).

indeed, becomes necessary for the courts to investigate the conduct of the trustees in the exercise of their discretion. Trustees have, at times, practiced on the public an egregious and cruel imposition, have mismanaged and neglected their trust, and have disposed of the money in their hands in a manner so arbitrary and selfish, that their maneuvers have been unable to bear the light of a searching investigation. The discretion vested in trustees must, therefore, be exercised fairly and reasonably, and in case of a controversy, it is a question of fact for the courts to decide whether they have done so.[14] The greater the discretion vested in the trustee, the more will such discretion be subject to the control of chancery.[15]

§ 404. **Poor Judgment by Trustees. No Court Interference.** No light reason, however, will be sufficient to induce the courts to interfere. They will not inquire whether the donor's bounty possibly might be more judiciously administered,[16] but will be satisfied if the trustees have been guided by an average intelligence in the conscientious exercise of their duty.[17] They will not overturn a **bona fide** determination of the trustees merely because a better result might have been reached, or even because the trustees have obtained an incidental advantage.[18] They will not remove trustees who have acted honestly and in good faith, though for a time carelessly and unbusinesslike.[19] They will not set aside a ninety-nine year lease for a consideration, fair at the time, where such lease has been made in good faith.[20] They will not control the discretion of the trustees until they have defaulted, or the trust has become impossible of execution,[21] or unless there is some failure or incapacity to act, or some abuse of the trust,[22] or until the trustees are guilty of such

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[14] 1916, Winslow v. Stark, 78 N. H. 135, 97 Atl. 979, 981.

[15] 1920, Maguire v. Macomb, 293 Ill. 441, 127 N. E. 682.

[16] 1868, Attorney General v. Moore, 19 N. J. Eq. (4 C. E. Green) 503, 507 (Affirming 18 N. J. Eq. (3 C. E. Green) 256).

[17] 1889, Bronson v. Strouse, 57 Conn. 147, 150, 17 Atl. 699.

[18] 1914, In re Southworth, 150 N. Y. Supp. 509, 164 App. Div. 825 (Affirmed 215 N. Y. 719, 109 N. E. 1092).

[19] 1904, Murdock v. Eliot, 77 Conn. 247, 58 Atl. 718.

[20] 1824, Black v. Ligon Harp. Eq., 205 (S. C.).

[21] 1915, Sandusky v. Sandusky, 265 Mo. 219, 177 S. W. 390.

[22] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 620, 621.

mismanagement, extravagance or fraud as would endanger the trust estate or violate the rights of the beneficiaries.[1] They will not interfere unless there is a positive transgression or no honest discretion is exercised, or unless the selfishness of the trustees rather than the design of the donor has become the rule of appropriation.[2] They will not reverse the application of a trust "for the support of the gospel among the colored people" of two cities to the use of the church to which the trustees belong which serves two-thirds of such beneficiaries, though there are other churches smaller and poorer which serve the same purpose.[3] They will sustain the action of the trustees of a trust created to continue indefinitely in expending a part of the capital for current expenses where there is no definite prohibition against or a plenary license thus to use the capital, where such action does not show an habitual encroachment on the fund.[4] Though two of the four trustees have become non-residents and a third is insolvent, and though the trustees have delayed action unnecessarily, they will not relieve them of their discretion, but will require them, for the purpose of the due and speedy execution of the trust, to report a plan or scheme for administering it.[5] Similarly, where a power of removal of a trustee is conferred upon certain persons "for such reasons as to them may seem expedient," the genuine judgment of such persons, honestly exercised, will not be overturned by the courts, whether it is right or wrong.[6]

§ 405. **Discretion vested in Court.** The question whether such a discretion can be reposed directly in a court has not often arisen. In a leading case which reached the supreme court of Virginia and the appellate court of New York, the supreme court of Virginia has indeed been requested to

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[1] 1904, Jenkins v. Berry, 119 Ky. 350, 359, 26 Ky. Law Rep. 1141, 83 S. W. 594; 1920, Bancroft v. Maine Sanitarium Ass'n, 119 Me. 56, 109 Atl. 585, 589.

[2] 1864, Pulpress v. African M. E. Church, 48 Pa. (12 Wright) 204.

[3] Pulpress v. African Church, supra.

[4] 1905, Stearns v. Newport Hospital, 27 R. I. 309, 319, 62 Atl. 132.

[5] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 620, 621.

[6] 1921, Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852, 862.

assume such a duty.[7] The question has been answered in the affirmative by the Illinois,[8] and in the negative by the California court. The latter court has pointed out that, while the determination what institutions in a certain city are orphan asylums is a judicial function which a court may exercise whether or not the will, in terms, confers such power, any attempted action of a court in choosing certain of these institutions, no rule, however, being laid down, is not a judicial function and cannot be exercised by a court.[9] In Delaware it has been held that, where a power of appointing trustees is given to either one of two courts, either court may validly exercise it, and if both refuse, equity will appoint the trustee.[10]

§ 406. **Trusts and Powers distinguished.** Whether or not a discretion confided in executors or trustees appointed by the donor must be exercised by such appointees personally, or may be vested by the courts in some other persons, is a matter of intention. "The court will be governed by the intent of the testator, to be gathered from the interpretation of the whole instrument, in determining the question whether it can appoint new trustees to exercise the power and discretion given to the trustees named in the will."[11] It, therefore, makes a tremendous difference whether a power of selecting the beneficiaries of a charitable trust is intended to be personal to the trustees or is attached to the trust created.[12] Where such discretion is intended as a mere power, it will die with the appointees. Where, on the other hand, it is intended as a trust, it will survive them. Trusts are always imperative, powers never. Trusts operate upon the conscience, powers invoke discretion.[13] Trusts will be enforced by the appointment of new trustees where such a step is necessary, while powers will lapse with the death of

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[7] 1873, Commonwealth v. Levy, 64 Va. (23 Gratt) 21. See 1865, Levy v. Levy, 33 N. Y. 97.

[8] 1887, Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331.

[9] 1896, In re Pearson, 113 Cal. 577, 584, 45 Pac. 849, 1162. See 1865, Levy v. Levy, 33 N. Y. 97.

[10] 1847, State v. Griffith, 2 Del. Ch. 392, 405 (Affirmed Griffith v. State, 2 Del. Ch. 421, 458).

[11] 1904, Colbert v. Speer, 24 App. D. C. 187, 209 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403).

[12] 1885, White v. Ditson, 140 Mass. 351, 353, 4 N. E. 606, 54 Am. Rep. 473.

[13] 1866, Stanley v. Colt, 72 U. S. (5 Wall.) 119, 168, 18 L. Ed. 502.

the appointees.[14] Wherever the discretion imposed on the appointee is a personal one, the courts will not appoint another person to exercise it.[15] Such a discretion "must **prima facie** be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom by legal transmission, the same character may happen to belong."[16] Where there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust can be fastened. "The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual."[17]

§ 407. **Reasons for holding a Provision to be a Power.** Nor are cases where a power rather than a trust is intended of rare occurrence. Large numbers of benevolent persons have their charitable impulses stirred solely by their interest in the personal work of the particular almoner with whom they are brought into contact.[18] Their intention to vest such person with a personal discretion will, therefore, be honored by the courts by a refusal to devolve such a discretion on others after the death or disability of such appointee.[19] This holds good even where such appointee has been given power to appoint a successor, but has died without having exercised such a power,[20] or where it is a corporation and has dissolved and reincorporated in another state.[21]

§ 408. **Trusts favored over Powers.** It should not be forgotten, however, that the courts incline very strongly to construe a doubtful provision as a trust rather than as a power. Where there is nothing in a will indicating that the

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[14] 1912, Dunn v. Morse, 109 Me. 254, 83 Atl. 795.

[15] 1904, Colbert v. Speer, 24 App. D. C. 187, 206 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403); 1918, Rogers v. Rea, 98 Ohio St. 315, 120 N. E. 828.

[16] 1892, Gambell v. Trippe, 75 Md. 252, 255, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235.

[17] 1854, Fontain v. Ravenel, 58 U. S. (17 How.) 369, 388, 15 L. Ed. 80. See 1896, Livesey v. Jones, 55 N. J. Eq. 204, 35 Atl. 1064 (Affirmed 56 N. J. Eq. 453, 41 Atl. 1115).

[18] 1905, Brown v. Condit, 70 N. J. Eq. 440, 449, 61 Atl. 1055.

[19] 1892, Gambell v. Trippe, 75 Md. 252, 255, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; 1907, Hadley v. Forsee, 203 Mo. 418, 429, 101 S. W. 59; 1861, Beekman v. Bonsor, 23 N. Y. 298, 304, 80 Am. Dec. 269 (Affirming 27 Barb. 260, 300); 1854, Fontain v. Ravenel, 58 U. S. (17 How.) 369, 15 L. Ed. 80.

[20] 1881, Appeal of Children's Hospital, 10 Weekly Notes Cas. 313 (Pa.).

[21] 1880, Crum v. Bliss, 47 Conn. 592, 603.

power given to the first trustee is a personal trust and confidence, and where there is nothing in the nature of the trust to prevent its execution by trustees appointed by the court,[22] it will be held that a mixed trust and power is created whose performance is imperative and not within the discretion of the trustees and which if necessary will be carried out through new trustees.[1] The charity will be considered as the dominant object, while the action of the trustees in selecting the beneficiaries will be treated as a subordinate incident a mere means to an end. It will be assumed that the testator in effect says that he gives the fund for charitable purposes, and to save application to the courts, he authorizes the trustees to determine the scheme.[2] Such a discretion clearly is not personal to the trustees named so as to cease with their death, but appertains to their office whether it is filled by the donor or by the courts.[3] This is clearly so where the trust is confided in testator's executors "or their successors,"[4] or in his "trustee or trustees for the time being."[5] It may be true though no successor is expressly mentioned. Though discretion to select the beneficiaries out of a world-wide class is conferred on designated trustees without a provision for their successors, the courts may appoint such successors where it was the intent of the donor that the trust should be carried out in any event.[6] It has, therefore, been held that the creation of a charitable corporation twenty-five years after testator's death does not imply a personal power in his appointees, since such purpose can be accomplished by any person of fair character, experience and ability, or by the court itself.[7] Discretion vested in trustees and their successors, appointed by themselves, has been devolved on

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[22] 1883, Sowers v. Cyrenius, 39 Ohio St. 29, 36, 48 Am. Rep. 418.

[1] 1896, Sawtelle v. Witham, 94 Wis. 412, 415, 416, 69 N. W. 72.

[2] 1888, Minot v. Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713.

[3] 1905, Woodruff v. Hundley, 147 Ala. 287, 39 So. 907; 1905, In re De Silver, 211 Pa. 459, 60 Atl. 1048.

[4] 1898, In re Murphy, 184 Pa. 310, 39 Atl. 70, 63 Am. St. Rep. 802. See 1878, Goodell v. Union Ass'n of Children's Home, 29 N. J. Eq. (2 Stew.) 32, 36.

[5] 1907, Godfrey v. Hutchins, 28 R. I. 517, 522, 68 Atl. 317.

[6] 1903, Grant v. Saunders, 121 Iowa 80, 88, 95 N. W. 411, 100 Am. St. Rep. 310; 1883, Ex parte Schouler, 134 Mass. 426.

[7] 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 524, 67 C. C. A. 393 (Affirming 126 Fed. 796).

appointees of the court where the original trustees were dead without having appointed successors.[8] Even a gift to testator's nephew (naming him) in trust for a certain class of beneficiaries "as in his judgment he may think best" has been carried out by an appointee of the court after the nephew was dead.[9] In a Maine case, a provision that the trustees may "designate any needy relatives" has been held to be personal to them, while another provision in favor of an institution or institutions "for the relief of suffering humanity" has been held to be mandatory.[10] Where a testator authorized and empowered executors with the advice of a certain physician to establish a hospital, it has been held that a trust was created and not a mere power connected merely with their office as executor.[11]

§ 409. **Trustee's Contrariety.** The mere fact that trustees may act differently than the testator has contemplated obviously is no objection against vesting power to act in them. Heirs who raise this objection occupy a peculiarly unfavorable position. For fear that the appointees might ignorantly or intentionally fail to do what the testator desired, they ask the courts to do the one thing which he did not desire, namely, pass his estate to his heirs.[12] "That the trustees might, by improper conduct, divert the trust property to their own use, affords no reason for declaring such trust void."[13]

§ 410. **Formalities.** What formalities are necessary in the exercise of this discretion depends upon the circumstances. Not much authority on this question can be found. It is clear that, whenever a discretion is given by the founder to his trustees to select the beneficiaries out of a class, it is not necessary that they be designated by name, or specifically pointed out.[14] Where, however, discretion is vested for the

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[8] 1881, Brown v. Pancoast, 34 N. J. Eq. (7 Stew.) 321; 1904, Colbert v. Speer, 24 App. D. C. 187, 209 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403).

[9] 1902, Fay v. Howe, 136 Cal. 599, 602, 69 Pac. 423.

[10] 1912, Dunn v. Morse, 109 Me. 254, 83 Atl. 795.

[11] 1922, Harter v. Johnson, 122 S. C. 90, 115 S. E. 217.

[12] 1907, In re Dulles, 218 Pa. 162, 165, 67 Atl. 49, 12 L. R. A. (N. S.) 1177.

[13] 1906, Banner v. Rolf, 43 Tex. Civ. App. 88, 93, 94 S. W. 1125, 1128.

[14] 1907, Godfrey v. Hutchins, 28 R. I. 517, 520, 68 Atl. 317.

selection of the institution to be benefited, a mere conclusion reached by a majority of the trustees is not sufficient definitely and irrevocably to determine the disposition to be made of the property. Some written instrument, sufficient in law to convey the property, should be executed.[15]

§ 411. **Discretion vested in other Persons.** Ordinarily, the power to exercise discretion will be vested in trustees. This, however, is not necessary. The trustees need not be the persons who select the beneficiaries.[16] Property may be given to trustees in trust to suffer and permit it to be under the care, custody, and management of certain deacons, in which case such deacons will manage the charity and the trustees will merely hold the legal title.[17] Similarly, gifts to trustees in trust to use the income of the property under the discretion of a certain ladies' aid society,[18] or for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors of a certain association,[19] are valid and enforcible. Discretion to devise a scheme for a proposed hospital may be reposed in a certain Methodist Episcopal conference and its presiding bishop.[20]

§ 412. **Apportionment of Gift.** Testators sometimes make gifts to a number of definitely described or named charities, but leave the question of the proportion which each is to enjoy to their trustees. While such a disposition has been held to be void under the old New York rule,[21] a different position has been taken by the other courts.[1] The result reached has well been summarized by the Connecticut court as follows: "The validity of a trust for public and charitable uses is not affected by the fact that two or more such uses may be made dependent upon one fund, even where

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15 1907, Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

16 1888, Appeal of Goodrich, 57 Conn. 275, 284, 18 Atl. 49.

17 1904, Worcester City Missionary Society v. Memorial Church, 186 Mass. 531, 72 N. E. 71.

18 1914, M. E. Church of Milford v. Williams, 6 Boyce 62, 96 Atl. 795 (Del.).

19 1848, Brown v. Kelsey, 56 Mass. (2 Cush.) 243.

20 1889, Appeal of Seagrave, 125 Pa. 362, 17 Atl. 412.

21 1870, In re Goodrich, 2 Redf. Sur. 45 (N. Y.).

1 1904, Leak v. Leak, 25 Ky. Law Rep. 1703, 78 S. W. 471; 1901, Haynes v. Carr, 70 N. H. 463, 479, 49 Atl. 638; 1896, Wheelock v. American Tract Society, 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; 1844, Gibson v. McCall, 1 Rich. Law 174 (S. C.). See 1887, Howe v. Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226.

the creator of the trust has not established an absolute rule for division, if he has clothed the trustee with power to establish the proportion from time to time at his discretion."[2] A gift to trustees to establish and carry on one or more free medical dispensaries has, therefore, been upheld.[3] Under a bequest to institutions "similar" to those named in another part of the will, the trustee must select from those institutions reported on by a master but may determine in what proportion the various beneficiaries are to take.[4] Under a power to make donations for charitable purposes, but particularly for two named purposes, the trustees may make such donations to other charities than those named.[5] The question of apportionment may even arise between an ordinary and a charitable gift. A bequest of a residue to testator's wife to be divided by her between herself and an orphan asylum is valid and enforcible. The donor may select his wife to make the proper division.[6]

§ 413. **Limits of Discretion. May it be as wide as the whole field of Charity?** The question, whether the discretion of trustees in the selection of the beneficiaries of a charity may be made co-extensive with the vast field of charity, or whether it must be confined within narrower limits, and if so, the extent of those limits, affords "a broad field of debate,"[7] and has divided the authorities into two camps. One side argues that a rule giving the testator power to authorize his trustees to select from the entire field of charity, or a very large part of it, makes the object, kind and character of his charity depend not on his own will, but on the choice of his trustees,[8] and amounts, in effect, to a posthumous power of attorney to make a will for him;[9] and that a trust sought to be created giving the trustee unlimited discretion

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[2] 1889, Bronson v. Strouse, 57 Conn. 147, 151, 17 Atl. 699.

[3] 1920, In re Keenan, 171 Wis. 94, 176 N. W. 857.

[4] 1888, Rhode Island Hospital Trust Co. v. Olney, 16 R. I. 184, 13 Atl. 118.

[5] 1920, Hodgson v. Hodgson, 150 Ga. 51, 102 S. E. 525.

[6] 1905, Franklin v. Boone, 39 Tex. Civ. App. 597, 604, 88 S. W. 262.

[7] 1890, Powell v. Hatch, 100 Mo. 592, 599, 14 S. W. 49.

[8] 1893, Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 568, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

[9] 1899, Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 411, 54 S. W. 200, 21 Ky. Law Rep. 1107; 1899, Keith v. Scales, 124 N. C. 497, 516, 32 S. E. 809.

of choice is not of a nature to be controlled by the courts, but the appointees must be classified as owners rather than as trustees.[10] According to this view, the objection of uncertainty is not obviated by a power to select unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain it.[11] Such class must be named in general language or general outline, leaving to the trustees the discretion to select the immediate objects within it to be benefited by the donor's bounty.[12] Some class must, therefore, be limited within which the discretion of the trustees is to move.[13] A power to provide for any other charitable object which may appeal to them is too indefinite and uncertain to be enforced.[14] The donor must devise his own scheme, and must not attempt to impose upon the courts the burden of consummating it for him otherwise than by decreeing the execution of what he has definitely and lawfully ordained.[15] "While the law, in many instances, sanctions the right of a testator to confer upon his executors or trustees the power of selecting the objects entitled to consideration in the distribution of his estate, it does not give such an unlimited and unbounded authority as would include all and every object which the testator himself might select in the free exercise of his own will, discretion and judgment. There must be some limit to the testator's power to dispose of his estate, and some certainty and definiteness in the selection of those who are to receive it by virtue of his last will and testament."[16] Provided that this limit has been correctly fixed, the working out of the details may be left to the trustees, subject to the terms of the gift and the supervision of the courts.[17]

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[10] 1917, Jones v. Patterson, 271 Mo. 1, 195 S. W. 1004.

[11] 1891, Tilden v. Green, 130 N. Y. 29, 45, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487; 1914, Utica Trust and Deposit Co. v. Thompson, 149 N. Y. Supp. 392, 396, 87 Misc. Rep. 31; 1886, Webster v. Morris, 66 Wis. 366, 391, 28 N. W. 353, 57 Am. Rep. 278.

[12] 1909, Kasey v. Fidelity Trust Co., 131 Ky. 609, 622, 115 S. W. 739.

[13] 1914, Gerick v. Gerick, 158 Ky. 478, 480, 165 S. W. 695.

[14] 1917, Egleston v. Trust Co. of Georgia, 147 Ga. 154, 93 S. E. 84, 85.

[15] 1866, Bascom v. Albertson, 34 N. Y. 584, 594.

[16] 1884, Prichard v. Thompson, 95 N. Y. 76, 80, 47 Am. Rep. 9 (Reversing 29 Hun. 295).

[17] 1913, In re Cleven, 161 Iowa 289, 293, 142 N. W. 986.

§ 414. **Limits of Discretion. New York History.** This doctrine, while it has been recognized more or less clearly in a number of jurisdictions such as Alabama,[18] Connecticut,[19] the District of Columbia,[20] Kentucky,[1] Maryland,[2] Michigan,[3] Minnesota,[4] Missouri,[5] and North Carolina,[6] has received in the state of New York its completest demonstration and demolition. It was held, in 1866, in the leading case of **Bascom v. Albertson**[7] that a testamentary gift to five persons "to found and establish an institution for the education of females" is invalid, since the proposed beneficiaries are limited to no class, condition, or race, and consist of the uneducated portion of one-half of the human race. The court stated that something more than a fund, a purpose, and a name is necessary, and that what was lacking cannot be supplied by a posthumous power of attorney. The case marked the complete departure of the state from the English charity doctrine,[8] and its holding can well be understood on that ground. It overruled previous New York cases on the question of the discretion that may be vested in trustees,[9] but was generally followed for a time, though it was departed from in 1877 in the case of **Power v. Cassidy,**[10] and a few other cases which followed the Power case.[11] This departure, however, was not permanent, since the court almost immediately retraced its steps and placed the law back where

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[18] 1912, Crim v. Williamson, 180 Ala. 179, 60 So. 293.

[19] 1885, Bristol v. Bristol, 53 Conn. 242, 256, 5 Atl. 687; 1852, White v. Fisk, 2 Conn. 31, 51.

[20] 1904, Colbert v. Speer, 24 App. D. C. 187, 206, 207 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403).

[1] 1902, Coleman, v. O'Leary, 114 Ky. 388, 404, 24 Ky. Law Rep. 1248, 70 S. W. 1068; 1914, Gerick v. Gerick, 158 Ky. 478, 165 S. W. 695.

[2] 1892, Gambell v. Trippe, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; 1890, Dulany v. Middleton, 72 Md. 67, 19 Atl. 146; 1886, Maught v. Getzendammer, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 352.

[3] 1873, Attorney General v. Soule, 28 Mich. 153, 158; 1896, Wheelock v. American Tract Society, 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; 1909, McPherson v. Byrne, 155 Mich. 338, 118 N. W. 985.

[4] 1912, Bemis v. Northwestern Trust Co., 117 Minn. 409, 413, 135 N. W. 1124.

[5] 1876, Schmucker v. Reel, 61 Mo. 592.

[6] 1845, Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94.

[7] 34 N. Y. 584, 588.

[8] See Chapter 2.

[9] 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 58 (N. Y.).

[10] 59 N. Y. 602, 35 Am. Rep. 550.

[11] 1881, Gumble v. Pfluger, 62 How. Prac. 118 (N. Y.); 1883, In re Hagenmeyer, 12 Abb. N. C. 432, 2 Dem. Sur. 87 (N. Y.).

the decision of **Bascom v. Albertson** had left it.[12] This was the situation when the will of Samuel Tilden came before the court in 1891.[13] The decision that this will was void because of its delegation of discretion to the trustees evoked nation-wide comment and led to a complete reversal of the New York policy in regard to charitable trusts. The so-called Tilden act was passed by the New York legislature in 1893 and with it the English charity doctrine was very largely restored to the jurisprudence of the state. The act, of course, was not retroactive. A few wills which had become effective before it was passed were, therefore, subsequently declared to be void by the courts on the ground that too large a discretion had been vested in the trustees.[14] Though it was intimated in 1908 that a discretion to select beneficiaries, limited only by a provision that they shall be "religious, educational, eleemosynary institutions" is too wide,[15] the state may now be regarded as being back at its original moorings, since it was decided in 1912 that a gift to trustees to be applied to such charitable and benevolent associations and institutions of learning, as the executors may select, is not void for uncertainty.[16]

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[12] 1884, Prichard v. Thompson, 95 N. Y. 76, 47 Am. Rep. 9; 1888, Wright v. O'Brian, 48 Hun. 618, 1 N. Y. Supp. 303, 15 N. Y. St. Rep. 1011; 1888, Wetmore v. New York Institution for Blind, 3 N. Y. Supp. 179, 188, 18 N. Y. St. Rep. 732 (Modified 9 N. Y. Supp. 753, 56 Hun. 313, 31 N. Y. St. Rep. 334); 1888, Holland v. Alcock, 108 N. Y. 312, 321, 16 N. E. 305, 2 Am. St. Rep. 420, 20 Abb. N. C. 447; 1889, Riker v. Leo, 115 N. Y. 93, 21 N. E. 719; 1890, In re Ingersoll, 12 N. Y. Supp. 103, 2 Con. Sur. 453, 34 N. Y. St. Rep. 148 (Reversed 59 Hun. 571, 14 N. Y. Supp. 22, 37 N. Y. St. Rep. 419); 1891, Read v. Williams, 125 N. Y. 560, 569, 26 N. E. 730, 21 Am. St. Rep. 748; 1891, Butler v. Green, 65 Hun. 99, 19 N. Y. Supp. 890, 47 N. Y. St. Rep. 322. But see 1886, Willets v. Willets, 20 Abb. N. C. 471 (N. Y.).

[13] 1891, Tilden v. Green, 130 N. Y. 29, 64, 28 N. E. 880, 29 N. E. 1033, 14 L. R. A. 33, 27 Am. St. Rep. 487. See Chapter 2 of this book, Sections 54 to 58.

[14] 1894, Fairchild v. Edson, 77 Hun. 298, 28 N. Y. Supp. 401, 59 N. Y. St. Rep. 163 (Affirmed 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609); 1895, People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; 1898, In re Botsford, 52 N. Y. Supp. 238, 240, 23 Misc. Rep. 388, 2 Gibbons 428 (Affirmed 55 N. Y. Supp. 495, 37 App. Div. 73).

[15] 1908, In re Shattuck, 193 N. Y. 446, 450, 86 N. E. 455. See 1911, In re Philbrick, 134 N. Y. Supp. 235, 74 Misc. Rep. 327.

[16] 1912, In re Cunningham, 206 N. Y. 601, 100 N. E. 437; 1912, In re Davis, 137 N. Y. Supp. 427, 77 Misc. Rep. 72 (Affirmed 141 N. Y. Supp. 1115, 156 App. Div. 911); 1913, Torrey v. Day, 141 N. Y. Supp. 814, 81 Misc. Rep. 39; 1914, Buell v. Gardner, 144 N. Y.

§ 415. **Difficulties with Limits of Discretion.** The former New York doctrine leads to considerable practical difficulties. The testator must designate some class within which the discretion of his trustees must move. No rule, however, is or can be laid down as to the composition of such class. Classes of beneficiaries are usually created in relation to locality, religion, sex, age, and actual need, though they may and sometimes are based on color, birthplace, nationality, political affiliations, and other minor considerations. They may be very small or may be almost as large as the entire field of charity. They may be confined to a hamlet or encircle the globe. Just what is a proper class cannot, therefore, be foretold and must, in the last analysis, rest on the arbitrary discretion of the highest court to which the matter can be appealed. This is not a very satisfactory state of affairs. It puts the courts in a false position and leaves both litigants and their counsel adrift on a sea of doubt without helm or compass. To come as near as can be to the solution of the difficulty thus presented, it will be well at this time and place to consider the question of proper classes of beneficiaries of charitable trusts.

§ 416. **Classes of Beneficiaries. Validity.** There certainly can be no valid objection to the creation of a class of beneficiaries. The fact that charitable bequests are limited to certain public purposes does not alter or in anywise affect their validity.[17] That an institution limits the dispensation of its blessings to one sex, or to one city, or to some religious or secular organization, does not deprive it of its charitable character.[18] "It is impossible that any human charity should cover the entire field of charitable activities including as it does the things that proceed from the love of God as well as those that proceed from the love of His sentient creation."[19] Even charities of the largest endowments are unable to meet all the demands made upon them; and yet a forfeiture of their powers would be a public calamity.[20] It is not neces-

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Supp. 945, 83 Misc. Rep. 513; 1916, In re Groot, 159 N. Y. Supp. 1003, 173 App. Div. 436 (Affirmed 226 N. Y. 576); 1919, In re Werner, 181 N. Y. Supp. 433.

[17] 1903, Huntsville v. Smith, 137 Ala. 382, 387, 35 So. 120.

[18] 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522.

[19] 1916, Buckley v. Monck, 187 S. W. 31, 33 (Mo.).

[20] 1904, In re Daly, 208 Pa. 58, 66, 57 Atl. 180.

sary, therefore, that a person's charity be aimed impartially at all suffering mankind.[1] "If that only be charity which relieves human want, without discriminating among those who need relief, then indeed it is a rarer virtue than has been supposed."[2] A charitable trust need, therefore, not be in the strictest sense a public one. It need merely be public as opposed to private.[3] A charity is not private merely because it is limited by its own terms to objects belonging to a certain denomination, or fraternal order, or color, or class. Men, as a rule, administer their charity through the organizations to which they belong. Viewed separately and with a narrow vision, such charities may be too limited to be called public. Viewed as a whole, their good work encompasses the circle of human suffering and is as universal as is the love of the human heart. They are like the soldiers in a long line of battle.[4] A charity is, therefore, public in its nature though only those who come within the definition of the class intended to be benefited may become entitled to anything under it.[5] Such class must be certain though its members necessarily are uncertain.[6]

§ 417. **Necessity of Class.** It is not merely permissible, but actually necessary in America, to create a class of beneficiaries, or at least provide the means by which this can be done. The American law is stricter than the English in this respect.[7] The uncertainty that exists in cases of charitable trusts is reduced to certainty if a definite class of beneficiaries is described and a mode is provided for the selection of the individual beneficiaries. **Id certum est quod certum reddi potest.**[8] A mere indefinite intention to leave property to charity will not be sufficient to create a charitable trust. Such class, however, need not be defined with mathematical certainty. It is sufficient if it is "designated in a general way and the practical application of the gift to its intended

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[1] 1907, Hadley v. Forsee, 203 Mo. 418, 427, 101 S. W. 59.

[2] 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522.

[3] 1902, Eliot's Appeal, 74 Conn. 586, 606, 51 Atl. 558.

[4] 1907, Widows' and Orphans' Home v. Commonwealth, 126 Ky. 386, 31 Ky. Law Rep. 775, 103 S. W. 354.

[5] 1893, Franklin v. Philadelphia, 2 Pa. Dist. Rep. 435, 436, 13 Pa. Co. Ct. Rep. 241.

[6] 1863, Paschal v. Acklin, 27 Tex. 173, 198.

[7] 1876, Adye v. Smith, 44 Conn. 60, 70, 26 Am. Rep. 424.

[8] 1884, Coit v. Comstock, 51 Conn. 352, 379, 50 Am. Rep. 29.

uses is confided to a trustee."[9] Something will depend upon the size of the class created. Where the beneficiaries form a very large class, minuteness in the directions by the testator in regard to their selection would probably paralyze the charity. Less definiteness will, therefore, be sufficient in such a case.[10] Nor need the individuals composing it be immediately ascertainable. "When a legacy is made to a certain class or collection of persons and is not dictated by caprice but by charitable and meritorious motives, although the individuals are unknown to the testator, such a legacy will not under our law be considered void for uncertainty."[11] The charity will not be permitted to fail because no court can determine in advance whether a particular person belongs to such a class.[12] A charitable trust for the benefit of a class of private individuals, described collectively by some characteristic trait by which they may be identified, is as good, valid and available as a private trust for the benefit of a private person identified by his proper name.[13]

§ 418. **Legality of Class.** It has already been intimated that the question of the validity or invalidity of a trust for any particular class created by the testator is a matter of great difficulty. "It is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty."[14] Charitable uses embrace an almost unlimited field of human benefactions and the classes themselves are many and varied. The multitudinous character of both classes and beneficiaries precludes the possibility of formulating with reasonable accuracy any rule of universal application prescribing the exact boundaries of classes of charitable trusts.[15] Their beneficiaries must neces-

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[9] 1914, Wilson v. First National Bank, 164 Iowa 402, 409, 145 N. W. 948, Ann. Cas. 1916, D. 481; 1904, Leak v. Leak, 25 Ky. Law Rep. 1703, 78 S. W. 471.

[10] 1899, Duggan v. Slocum, 92 Fed. 806, 810, 34 C. C. A. 676.

[11] 1891, Milne v. Milne, 17 La. 46, 54.

[12] 1902, Fay v. Howe, 136 Cal. 599, 601, 69 Pac. 423.

[13] 1836, Moore v. Moore, 34 Ky. (4 Dana) 354, 368, 29 Am. Dec. 417; 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 211, 79 S. W. 831.

[14] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 199, 11 L. Ed. 205.

[15] 1902, Fay v. Howe, 136 Cal. 599, 600, 69 Pac. 423.

sarily be described in general terms being persons in many cases yet unborn. Classes may be described running down through all time, but individuals can only be designated as belonging to such classes.[16] New needs arising out of the progress of the human race create new classes, while other classes that once called urgently for help are by the same process passing out of existence. No definite rule can, therefore, be prescribed as to the size or composition of any such class or as to the territory which it is to cover.

§ 419. **Classes illustrated. Test of Validity.** It has sometimes been attempted to draw geographical limits to a class or to qualify it by numbers. This attempt has been abortive. The wider or narrower geographical boundaries assigned to a charity present at most a difference of degree but not of principle.[17] "If restrictions, either as to locality or numbers included in a class of beneficiaries, are necessary to the validity of a charitable bequest, we know of no rule by which the line may be drawn."[18] Given, therefore, a trust with or without a trustee, a particular purpose and a class great or small, and we have a good trust for charitable uses.[19] It is immaterial "how large or how small a section of the public it is intended to benefit."[20] While a gift to a known and designated person is not a charity, since it lacks the essential prerequisites of indefiniteness,[1] the widows and orphans of the ministers of a certain church,[2] indigent and needy Masons in Boston and vicinity,[3] the orphaned children

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[16] 1884, Coit v. Comstock, 51 Conn. 352, 377, 378, 50 Am. Rep. 29.

[17] 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 810, 811, 84 N. W. 273, 83 Am. St. Rep. 553.

[18] 1900, St. James Asylum v. Shelby, **supra.**

[19] 1900, Harrington v. Pier, 105 Wis. 485, 514, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[20] 1919, Roberts v. Corson, 79 N. H. 215, 107 Atl. 625, 626.

[1] 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 182; 1863, Paschal v. Acklin, 27 Tex. 174, 198. But see 1881, Goodale v. Mooney, 60 N. H. 528, 536, 49 Am. Rep. 334. See 1842, Hester v. Hester, 37 N. C. (2 Ired. Eq.) 330, 340, which holds that a legacy to "some promising young man of good talents and of the Baptist order," to be selected by testator's executor, is void for indefiniteness.

[2] 1907, Sears v. Attorney Genenral, 193 Mass. 551, 553, 79 N. E. 772.

[3] 1909, Masonic Education and Charity Trust v. Boston, 201 Mass. 320, 325, 87 N. E. 602.

of Masons of a state,[4] that portion of a community which lives by manual labor,[5] the resident poor of a village,[6] or town,[7] ten poor boys to be selected by the trustees,[8] and even some "poor deserving Jewish family" residing in a certain city,[9] may make up such a class. A bequest to a mission of a particular church, sufficiently indicates the class of beneficiaries intended.[10] That a large sum ($4,000,000) is left for a comparatively small class of beneficiaries is no objection to the gift.[11] Nor does it make any difference that the beneficiaries are very numerous and widely scattered. They need not be confined to the residents of some state,[12] or locality,[13] but may comprise all "destitute and friendless children" without restriction as to race or residence,[14] or all orphans or foundlings,[15] or white or colored patients,[16] or all the poor without designating them by age, number, color, sex, creed, church, district, county, state or nation.[17] While the immediate beneficiaries of a hospital, or school, or other single institution are not directly within the ordinary requirements of a class, the scheme will, nevertheless, be regarded as within the rules touching public charities.[18] It has been stated by the Wisconsin court that all that is necessary is that the donor designate a charitable purpose of his own, narrower than the field of charity generally, and that if any

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[4] 1909, Green v. Fidelity Trust Company, 134 Ky. 311, 322, 120 S. W. 283.

[5] 1854, Sweeney v. Sampson, 5 Ind. 465, 476.

[6] 1886, Webster v. Morris, 66 Wis. 366, 384, 28 N. W. 353, 57 Am. Rep. 278.

[7] 1913, In re Rasquin, 144 N. Y. Supp. 988, 159 App. Div. 845.

[8] 1922, Sherman v. Shaw, 243 Mass. 257, 137 N. E. 374.

[9] 1889, Bronson v. Strouse, 57 Conn. 147, 17 Atl. 699.

[10] 1858, Appeal of Domestic and Foreign Missionary Society, 30 Pa. 425, 435.

[11] 1923, Kitchen v. Pitney, — — N. J. ——, 119 Atl. 675.

[12] 1911, In re Robinson, 203 N. Y. 380, 389, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

[13] 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434.

[14] 1893, Woodruff v. Marsh, 63 Conn. 125, 129, 26 Atl. 846, 38 Am. St. Rep. 346; 1892, Barkley v. Donnelly, 112 Mo. 561, 571, 19 S. W. 305.

[15] 1916, In re Hartung, 40 Nev. 262, 160 Pac. 782, 161 Pac. 715.

[16] 1922, Harter v. Johnson, 122 S. C. 96, 115 S. E. 217.

[17] 1903, Thompson v. Brown, 116 Ky. 102, 75 S. W. 210, 62 L. R. A. 398, 105 Am. St. Rep. 194 (Reversing on rehearing 70 S. W. 674, 24 Ky. Law Rep. 1066); 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525; Distinguished 1856, Owens v. Missionary Society of M. E. Church, 14 N. Y. (4 Kern) 380, 406, 67 Am. Dec. 160.

[18] 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 518, 67 C. C. A. 393.

specific use, clearly charitable, is excluded by him, then to a demonstration the gift is not to charity generally and without limit, and does not fail of the definiteness required for its support.[19] Therefore, a gift to a trustee to be spent in charity in Italy and New York City is valid.[20]

§ 420. **Absurdness of Classification.** The fact that the personal eccentricities of the donor have colored his gift is immaterial, provided that the class created by him comes within the definition of a charity. He has the right to dispose of his property to any legal public use, even though his classification is ridiculous. He may select as his beneficiaries, aged and respectable, white bachelors and widowers over sixty years old and residents of the state for ten years, wholly, or partially unable to support themselves.[21] He may make a donation to the sick and disabled members of mutual benefit associations composed respectively of bankers, teachers and printers.[22] He may create a home for aged, infirm, or invalidated gentlemen and merchants on the order of the Prytaneum of ancient Athens.[23] He may exclude from it such persons as use tobacco in any shape or form, though the contemplated beneficiaries are superannuated clergymen.[24] He may limit his gift to the "worthy, deserving, poor, white, American, Protestant, democratic widows and orphans" of a certain city, and thus qualify the beneficiaries not only by their worth and poverty, but also by their race, their place of birth, and their religious and political affiliations.[25] The question in such a case will not be whether there are many persons that cannot meet the requirements, but whether there are any that can. Of course, the class created must consist of persons who are genuine subjects of charity. "A trust for the exclusive benefit of the least wealthy of a well-

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[19] 1904, Kronshage v. Varrell, 120 Wis. 161, 162, 164, 97 N. W. 928.

[20] 1915, Stewart v. Franchetti, 153 N. Y. Supp. 453, 167 App. Div. 541.

[21] 1923, Kitchen v. Pitney, — — N. J. ——, 119 Atl. 675.

[22] 1903, Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420.

[23] 1857, Cresson v. Cresson, Fed. Cas. No. 3,389, page 807, 6 Am. Law Reg. 42, 5 Pa. Law J. Rep. 431, 5 Clark 431.

[24] 1910, Hamilton v. Mercer Home, 228 Pa. 410, 77 Atl. 630.

[25] 1886, Beardsley v. Bridgeport, 53 Conn. 489, 491, 3 Atl. 557, 55 Am. Rep. 152.

to-do or prosperous class could not be sustained as a charity."[26]

§ 421. **Classification based on Religious Faith.** One of the elemental forces that have split society into groups is religion. Accordingly, countless shades of religious opinions prevail and have crystallized into numerous denominational bodies. It is but natural that members of such bodies should think of their particular denomination first when making charitable bequests. A Catholic will not ordinarily give his property for the propagation of Protestant views, nor will a Jew ordinarily exert himself on behalf of the Christian religion. The courts accordingly recognize gifts to narrowly denominational purposes and carry them into effect. An institution may, therefore, limit its dispensations to any religious organization.[1] A donor may confine his charity to the support of Trinitarian or Unitarian doctrines.[2] This applies not only to purely religious charities, but also to educational and eleemosynary gifts which involve a religious test. The amelioration of the condition of the aged of a particular religious denomination is, therefore, a good charitable purpose.[3] Accordingly, classes of such charities limited to Catholics,[4] or Catholic institutions,[5] to Protestants,[6] or some branch of the Protestant church such as the Congregationalist,[7] Lutheran,[8] Baptist,[9] or any other,[10] or to Jews,[11] have been upheld by the courts.

[26] 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 341, 91 N. E. 385.

[1] 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522. See 1902, Coleman v. O'Leary, 114 Ky. 388, 415, 24 Ky. Law Rep. 1248, 70 S. W. 1068.

[2] 1859, Attorney General v. Dublin, 38 N. H. 459, 509.

[3] 1913, Norris v. Loomis, 215 Mass. 344, 102 N. E. 419.

[4] 1877, Power v. Cassidy, 79 N. Y. 602, 612, 35 Am. Rep. 550.

[5] 1895, Tichenor v. Brewer, 98 Ky. 349, 33 S. W. 86, 17 Ky. Law Rep. 936; 1877, Power v. Cassidy, supra.

[6] 1884, Appeal of Tappan, 52 Conn. 412, 418; 1886, Beardsley v. Bridgeport, 53 Conn. 489, 491, 3 Atl. 557, 55 Am. Rep. 152; 1857, Fink v. Fink, 12 La. Ann. 301, 320, 321; 1916, In re MacDowell, 217 N. Y. 454, 112 N. E. 177.

[7] 1911, French v. Lawrence, 76 N. H. 234, 81 Atl. 705.

[8] 1827, Witman v. Lex, 17 S. and R. 88, 17 Am. Dec. 644 (Pa.); 1906, Banner v. Rolf, 43 Tex. Civ. App. 88, 92, 94 S. W. 1125.

[9] 1897, Dye v. Beaver Creek Church, 48 S. C. 444, 452, 26 S. E. 717, 59 Am. St. Rep. 724.

[10] 1888, Appeal of Goodrich, 57 Conn. 275, 284, 18 Atl. 49; 1893, Conklin v. Davis, 63 Conn. 377, 383, 28 Atl. 537; 1866, Attorney General v. Old South Society, 95 Mass. (13 Allen) 474, 491; 1882, Union M. E. Church v. Wilkinson, 36 N. J. Eq. (9 Stew.) 141, 145 (Affirmed 38 N. J. Eq. (11 Stew.) 514).

[11] 1889, Bronson v. Strouse, 57 Conn. 147, 17 Atl. 699; 1868,

§ 422. **Classification. Lodge Membership.** Closely assimilated with churches, and taking their places in some cases, are the various lodges which have reached a phenomenal development within the last century. It is to be expected that classes should have been created with a view to such lodges. Nor have the courts been slow in according their recognition to such classification. An orphan asylum for orphans of Masons has, therefore, been declared to be a "purely public charity" within the meaning of the exemption clause of the Kentucky constitution.[12] Indigent and needy Masons in Boston and vicinity have been held to form a good class capable of being the beneficiaries of a charity.[13] The same holds good of the widows and orphans of deceased members of a lodge, whether they are confined to a certain state,[14] or whether they comprise all such widows and orphans wherever found.[15] Even the members of a lodge may form such a class.[16]

§ 423. **Classification by Race.** Another outstanding division of the human family is race. It is but natural that a white person should sympathize most with a fellow white and only secondarily with persons of another color. This tendency is taken into consideration by the courts in construing charitable gifts. It is, therefore, no objection to a gift that it is confined to one race[17] such as the white[18]

Mayer v. Society for Visitation of the Sick, 2 Brewst. 385 (Pa.); 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 211, 79 S. W. 831.

[12] 1907, Widows' and Orphans' Home v. Commonwealth, 126 Ky. 386, 31 Ky. Law Rep. 775, 103 S. W. 354.

[13] 1909, Masonic Education and Charity Trust v. Boston, 201 Mass. 320, 325, 87 N. E. 602.

[14] 1901, Troutman v. De Boissiere Odd Fellows' Orphans' Home, 64 Pac. 33, 5 L. R. A. (N. S.) 692 (Kans.); 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 325, 120 S. W. 283.

[15] 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. (3 Pickle) 668, 11 S. W. 825, 4 L. R. A. 699.

[16] 1919, Roberts v. Corson, 79 N. H. 215, 107 Atl. 625.

[17] 1902, Coleman v. O'Leary, 114 Ky. 388, 415, 24 Ky. Law Rep. 1248, 70 S. W. 1068.

[18] 1902, Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; 1886, Beardsley v. Bridgeport, 53 Conn. 489, 491, 3 Atl. 557, 55 Am. Rep. 152; 1847, State v. Griffith, 2 Del. Ch. 392, 408 (Affirmed 2 Del. Ch. 421); 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 325, 120 S. W. 283; 1906, In re Murray, 141 N. C. 588, 593, 54 S. E. 435; 1885, Pierce v. Weaver, 65 Tex. 44, 47; 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 505, 506, 16 L. Ed. 701.

or the black.[19] A bequest for the education of the Freedmen of the nation, therefore, creates a valid charity.[20] Nor will a gift which is confined to the white race violate the Fourteenth Amendment.[21]

§ 424. **Classification by Sex. Woman Suffrage.** The most obvious division is in relation to sex. It is notorious that women, physically weaker as they are than men, and burdened with the duty of bearing and rearing the future generations, are severely handicapped in the struggle for existence. Their difficulties are intensified by the fact that for ages the affairs of the world have been principally conducted by men, and that in consequence the prevailing laws and customs in almost every field of human endeavor reflect the male rather than the female mind. It is not an easy task for a woman to accommodate her feminine instincts to the man-made order of the world. It is not astonishing that many fail or pass through an unduly protracted struggle before success is finally achieved. This is so particularly in this day and generation when women enter the ranks, not only of commerce and manufacture, but of the trades and professions as well. It is clear, therefore, that women as such are a class that may well be the recipient of charitable assistance, particularly when they are needy and poor.[1] This applies not only to widows[2] and to women deserted by their husbands,[3] oftentimes with a family of small children unprovided for, but also to unmarried women, whether they

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[19] 1869, Ex parte Lindley, 32 Ind. 367; 1876, Craig v. Secrist, 54 Ind. 419, 426; 1902, Attorney General v. Goodell, 180 Mass. 538, 62 N. E. 962; 1864, Pulpress v. African M. E. Church, 48 Pa. (12 Wright) 204.

[20] 1873, McAllister v. McAllister, 46 Vt. 272, 280.

[21] 1874, Kinnaird v. Miller, 66 Va. (25 Grat.) 107, 118, 119.

[1] 1921, Palmer v. Oiler, 102 Ohio St. 271, 131 N. E. 362.

[2] 1911, Robbins v. Boulder County, 50 Colo. 610, 617, 115 Pac. 526; 1876, De Gruler v. Ferguson, 54 Ind. 549; 1869, Swasey v. American Bible Society, 57 Me. 523, 526; 1893, Holmes v. Coates, 159 Mass. 226, 34 N. E. 190; 1907, Sears v. Attorney General, 193 Mass. 551, 553, 79 N. E. 772; 1898, Towle v. Nesmith, 69 N. H. 212, 42 Atl. 900; 1891, Lowell v. Charlestown, 66 N. H. 584, 32 Atl. 160.

[3] 1876, De Bruler v. Ferguson, 54 Ind. 549; 1909, Hilliard v. Parker, 76 N. J. Eq. 447, 449, 74 Atl. 447.

are poor[4] or insane,[5] or otherwise unfortunate. Nor does it stop here. Accordingly, "refined, educated, Protestant gentlewomen" may form a good class.[6] So may needy young women students at a certain university,[7] and poor worthy legitimate girls of good families.[8] Working girls are oftentimes, by reason of low wages and limited means, unable to provide themselves with sufficient sustenance and clothing, and the comforts and the educational and ethical environments of a home.[9] They frequently have no home worthy of the name and must work hard and suffer privations. Though not paupers, they are so poor as to make it a most worthy charitable enterprise to provide them with a home.[10] Poverty and want, however, is not even necessary. Women in the past have not generally been on an equality with men, so far as voting is concerned. It has, therefore, been held that the women of the United States are a distinct class, not too numerous to be the beneficiaries of a charitable trust created for the purpose of securing this right for them.[11]

§ 425. **Classification by Age.** Next to women, persons at either extreme of age form a class of beneficiaries most often met with in all communities. A gift to aid the deserving, aged, native-born in a certain town needing help, therefore, creates a valid charity for a sufficiently defined class.[12] The field for charity on the other end of life, however, is immensely more important from every viewpoint. Children not only need a home and sufficient food and clothing to supply their bodily wants, but they also need an education

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[4] 1883, In re Robinson, 63 Cal. 620; 1884, Appeal of Tappan, 52 Conn. 412, 418; 1869, Swasey v. American Bible Society, 57 Me. 523, 526; 1923, State Bank and Trust Co. v. Patridge, —— Ky. ——, 248 S. W. 1056.

[5] 1894, Hayden v. Connecticut Hospital, 64 Conn. 320, 30 Atl. 50.

[6] 1916, In re MacDowell, 217 N. Y. 454, 112 N. E. 177.

[7] 1912, Sawyer v. Dearstyne, 139 N. Y. Supp. 955.

[8] 1919, King v. Horton, 149 Ga. 361, 100 S. E. 103.

[9] 1909, Thornton v. Franklin Square House, 200 Mass. 465, 466, 86 N. E. 909, 22 L. R. A. (N. S.) 486.

[10] 1905, Franklin Square House v. Boston, 188 Mass. 409, 410, 74 N. E. 675.

[11] 1898, Garrison v. Little, 75 Ill. App. 402, 417.

[12] 1902, Fay v. Howe, 136 Cal. 599, 69 Pac. 423; 1913, Norris v. Loomis, 215 Mass. 344, 102 N. E. 419. See 1865, Odell v. Odell, 92 Mass. 1, 4. See also 1923, State Bank and Trust Co. v. Patridge, —— Ky. 248 S. W. 1056; 1923, Kitchen v. Pitney, —— N. J. ——, 119 Atl. 675; 1923, Institution for Savings v. Roxbury Home, 244 Mass. 583, 139 N. E. 301.

and religious culture if they are to develop into useful citizens. In addition, they are a far more numerous class than are old men and women, and are also more helpless and subject to exploitation. Where the family life of their parents is happy and prosperous, they will not ordinarily become subjects of public charity. Where, however, such life has become disrupted by sickness, dissipation, extreme poverty, death, divorce, abandonment, or any other calamity, they indeed form a class which calls loudly for charitable assistance. Accordingly, gifts to poor or orphaned children,[13] or destitute and friendless children,[14] or to such children belonging to some governmental subdivision[15] such as a county,[16] a "beat,"[17] a township,[18] a city,[19] or an entire state,[20] have been recognized. Nor is poverty a prerequisite in such cases. The children of the well-to-do need education as much as the children of the poor. An educational trust is, therefore, valid, though it is not confined to poor children.[1]

§ 426. **Classification based on Poverty.** Another distinct class of society composed of old and young, male and female, Jew and Gentile, white and colored, has been declared by no less an authority than the Bible to be always with us. It consists of the poor of both sexes, and of all the various ages, religious beliefs and races. To be a member of such a class, it is not necessary that a person be a pauper. A charitable trust may go beyond the mere support of paupers,[2] may aim to save poor people from pauperism,[3] and may even exclude

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[13] 1847, McBride v. Elmer, 6 N. J. Eq. (2 Halst. Ch.) 107; 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 9 Am. Dec. 619.

[14] 1893, Woodruff v. Marsh, 63 Conn. 125, 128, 26 Atl. 846, 38 Am. St. Rep. 346.

[15] 1909, Hagen v. Sacrison, 19 N. D. 160, 184, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[16] 1872, Newson v. Starke, 46 Ga. 88, 91; 1836, Moore v. Moore, 34 Ky. (4 Dana) 354, 29 Am. Dec. 417; 1906, In re Murray, 141 N. C. 588, 593, 54 S. E. 435.

[17] 1862, Williams v. Pearson, 38 Ala. 299, 308.

[18] 1906, Crow v. Clay County, 196 Mo. 234, 277, 95 S. W. 369.

[19] 1902, Coleman v. O'Leary, 114 Ky. 388, 403, 24 Ky. Law Rep. 1248, 70 S. W. 1068.

[20] 1902, Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; 1869, Miller v. Atkinson, 63 N. C. 537, 539; 1906, Tincher v. Arnold, 147 Fed. 665, 570, 671, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[1] 1896, Bedford v. Bedford, 99 Ky. 273, 290, 35 S. W. 926, 18 Ky. Law Rep. 193; 1885, Pierce v. Weaver, 65 Tex. 44, 47; 1906, Inglish v. Johnson, 42 Tex. Civ. App. 118, 125, 95 S. W. 558.

[2] 1904, Brookville v. Startzell, 207 Pa. 347, 355, 56 Atl. 938.

[3] 1888, Dascomb v. Marston, 80 Me. 223, 332, 13 Atl. 888.

paupers in terms or by implication.[4] On the other hand, it may be confined to paupers,[5] but may exclude persons known to be intemperate, lazy, immoral, or undeserving.[6] It may and usually is confined to poor persons of a certain locality,[7] such as a city,[8] a town,[9] a township,[10] or a county,[11] though the class may consist of ten poor boys to be selected by the trustees without any reference to geographical considerations.[12]

§ 427. **Miscellaneous Classifications.** The test of a valid classification is not confined to questions of sex, age, race, locality, poverty, religion and other related facts, but may go beyond them and may, more or less, disregard them all. Classes of beneficiaries may be limited to disabled soldiers,[13] to the inmates of an orphan asylum as distinguished from the asylum itself,[14] to "poor emigrants and travelers coming to

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[4] 1891, Dailey v. New Haven, 60 Conn. 314, 324, 22 Atl. 945, 14 L. R. A. 69; 1863, Webb. v. Neal, 87 Mass. (5 Allen) 575.

[5] 1867, Heuser v. Harris, 42 Ill. 425, 436.

[6] 1882, Hesketh v. Murphy, 36 N. J. Eq. (9 Stew.) 304 (Affirming 35 N. J. Eq. 23). There certainly is no urgent duty to relieve the needs of spendthrifts, town loafers, and the worthlessly improvident, and society may, without qualms of conscience, leave them to the consequences of their own folly. 1920, Treadwell v. Beebe, 107 Kans. 31, 190 Pac. 768, 772.

[7] 1895, Trim v. Brightman, 168 Pa. 395, 31 Atl. 1071; 1904, Brookville v. Startzell, 207 Pa. 347, 355, 56 Atl. 938.

[8] 1891, Dailey v. New Haven, 60 Conn. 314, 324, 22 Atl. 945, 14 L. R. A. 69; 1894, Phillips v. Harrow, 93 Iowa 92, 103, 61 N. W. 434; 1863, Webb v. Neal, 87 Mass. (5 Allen) 575; 1878, Goodell v. Union Ass'n of Children's Home, 29 N. J. Eq. (2 Stew.) 32, 56; 1882, Hesketh v. Murphy, 36 N. J. Eq. (9 Stew.) 304 (Affirming 35 N. J. Eq. (8 Stew.) 23); 1872, Hornberger v. Hornberger, 59 Tenn. (12 Heisk.) 635. But see 1879, District of Columbia v. Washington Market Co., 3 MacArthur 559, 578 (Affirmed 108 U. S. 243, 2 S. Ct. 543, 27 L. Ed. 714).

[9] 1897, In re Strong, 68 Conn. 527, 531, 37 Atl. 395; 1860, Howard v. American Peace Society, 49 Me. 288, 305; 1888, Dascomb v. Marston, 80 Me. 223, 232, 13 Atl. 888; 1894, Sheldon v. Stockbridge, 67 Vt. 299, 306, 31 Atl. 414.

[10] 1883, Scott v. Marion Twp., 39 Ohio St. 153, 156; 1853, Urmay v. Wooden, 1 Ohio St. 160, 59 Am. Dec. 615.

[11] 1867, Heuser v. Harris, 42 Ill. 425, 436; 1876, Lagrange County v. Rogers, 55 Ind. 297; 1842, State v. Gerard, 37 N. C. (2 Ired. Eq.) 210, 220; 1841, State v. McGowen, 37 N. C. (2 Ired. Eq.) 9; 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed.) 305, 349; 1863, Paschal v. Acklin, 27 Tex. 174, 200.

[12] 1922, Sherman v. Shaw, 243 Mass. 257, 137 N. E. 374.

[13] 1893, Holmes v. Coates, 159 Mass. 226, 34 N. E. 190.

[14] 1910, Comstock v. Boyle, 144 Wis. 180, 128 N. W. 870.

St. Louis on their way **bona fide** to settle in the West,"[15] to any deserving persons suffering from cancer in its early and probably curable stages,[16] to destitute seamen at a certain port,[17] to persons connected with a life-saving station,[18] and to the reading public of a city.[19] In a bequest for a hospital for the sick and injured, contagious, eruptive diseases, hopeless or incurable patients, or cases of insanity may be excluded.[20] Gifts may be made for the benefit of feeble churches of a certain denomination in a state,[21] and for the use of clergymen of a certain association, diocese, conference, or synod who may be benefited, either indiscriminately[1] or by confining the gift to the most needy among them,[2] or to such whose salaries as paid or agreed to be paid by their vestries are less than $500.[3]

§ 428. **May Testator's Relatives be made Beneficiaries?** To what extent descendants or other relatives of a donor may be made the beneficiaries of a charitable trust is a question beset with difficulties. The donor clearly may make provision for himself out of the charity which he creates. "It cannot be an objection to the designation of funds or property, for charitable purposes, that the founder secures to himself, with the rest of the community, a right of partaking the benefits of the charity. If the general objects be charitable, his participation in them, on the same footing with others, cannot render them the less so."[4] If the donor can make provision for himself, it would follow that he can do the same for those who are nearest to him in life. The creation of a preference in favor of relatives or named persons, therefore, does not of itself make invalid a trust which is in other respects valid.[5] A gift does not cease to be a

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[15] 1860, Chambers v. St. Louis, 29 Mo. 543, 588.

[16] 1920, Treadwell v. Beebe, 107 Kans. 31, 190 Pac. 768.

[17] 1902, Eliot's Appeal, 74 Conn. 586, 598, 51 Atl. 558.

[18] 1908, Richardson v. Mullery, 200 Mass. 247, 249, 86 N. E. 319.

[19] 1891, New Haven Young Men's Institute v. New Haven, 60 Conn. 32, 42, 22 Atl. 447.

[20] 1913, Dykeman v. Jenkines, 179 Ind. 549, 563, 101 N. E. 1013, Ann. Cas. 1915 D. 1011.

[21] 1911, French v. Lawrence, 76 N. H. 234, 81 Atl. 705.

[1] 1862, Williams v. Pearson, 38 Ala. 299, 308.

[2] 1858, Preachers' Aid Society v. Rich, 45 Me. 552, 559.

[3] 1880, Graham v. Alden, 20 Abb. N. C. 477 (N. Y.).

[4] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 178, 26 Am. Dec. 446.

[5] 1916, **In re** MacDowell, 217 N. Y. 454, 462, 112 N. E. 177.

charity because certain persons are named as of the class to be assisted, or even because provision is made that a preference shall be accorded to them. When they are provided for as part of the poor who are to receive the benefits of the donation, its public object and purpose continues, and it is still invested with the character of public charity.[6] Such a preference is a lawful exercise of the rightful power of the donor to make a charitable gift.[7] Donations for a home,[8] for a scholarship,[9] for the education[10] or relief[11] of the poor are, therefore, valid charities, though a preference is given to certain relatives and friends of the donor.

§ 429. **Education of Testator's Relative for the Ministry.** Whether a gift for the education of a relative of the testator for the ministry creates a public charity depends upon the circumstances. Where the person is determined and the gift is for his individual benefit, it clearly is beyond the limits of charity.[12] Where, however, the purpose is to advance the course of good morals and Christian education,[13] particularly where none of the donor's relatives are definitely designated,[14] a different situation is presented. Such a gift, of course, cannot be enforced by a relative within the class named after he has clearly demonstrated his inability to reach the goal set by the testator.[15]

§ 430. **Classification based on relationship. Negative View.** This leaves the question whether a greater or smaller class of testator's relatives may be made beneficiaries. It has been pointedly asked: "Why should a man be permitted, by devising his property for the benefit of poor relations, to keep it **in solido** for centuries, nay, forever, while in reference to his own children, he is not permitted to keep it in-

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[6] 1889, Bullard v. Chandler, 149 Mass. 532, 540, 21 N. E. 951, 5 L. R. A. 104.

[7] 1902, State v. Toledo, 23 Ohio Cir. Ct. Rep. 327, 344; 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 281.

[8] 1916, **In re MacDowell, supra.**

[9] 1900, Dexter v. Harvard College, 176 Mass. 192, 195, 57 N. E. 371.

[10] 1863, Paschal v. Acklin, 27 Tex. 173, 198.

[11] 1891, Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110.

[12] 1882, Appeal of McMillen, 11 Weekly Notes Cas. 440 (Pa.).

[13] 1871, **In re** Heddleson, 8 Phila. 602 (Pa.).

[14] 1869, Swasey v. American Bible Society, 57 Me. 523, 526; 1837, **In re** Flaherty, 2 Pars. Eq. Cas. 186, 192 (Pa.).

[15] 1837, **In re** Flaherty, **supra.**

alienable but for two lives in being?"[16] There is no general object to justify an accumulation in the possible advantage which the public may obtain by having the descendants of the testator protected from beggary and from becoming a public charge, and the slight prospective public benefit that may flow from such a policy does not justify it.[17] Accordingly, gifts for the benefit of testator's needy brothers and sisters,[18] to such of testator's brothers and sisters and their wives or husbands and their children as may need aid or support,[19] for the use of any and all of his heirs deemed worthy,[20] for the education of the descendants of two named persons,[21] or for any relative whom testator may, without apparent reason, have overlooked,[22] have been held to be void and of no effect. The fact that the gift is to the needy of one particular family, or of the descendants of the testator, or of his ancestors, makes it a family matter and not one of public interest. Therefore, a corporation formed to educate or aid the members of the Beekman family is subject to a transfer tax. "It would be a very easy method of avoiding the statute of perpetuities if corporations could be created to perpetuate the family name and permit the use of the funds for the maintenance and education of near or far removed relatives."[23] It has, therefore, been stated that charity manifests itself by love for mankind as distinguished from the love of kindred or intimate friends or close associates.[1]

§ 431. **Classification based on Relationship. Majority View.** The weight of authority, however, points the other way. It has been said that a trust to benefit poor relatives presents no danger to republican institutions by relegating

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[16] 1858, Beekman v. People, 27 Barb. 260, 306 (Affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[17] 1886, Kent v. Dunham, 142 Mass. 216, 219, 7 N. E. 730, 56 Am. Rep. 667.

[18] 1911, Wilce v. Van Anden, 248 Ill. 358, 365, 94 N. E. 42, 14 Am. St. Rep. 212.

[19] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 281.

[20] 1892, Butler v. Green, 65 Hun. 99, 19 N. Y. Supp. 890, 47 N. Y. St. Rep. 322.

[21] 1903, Johnson v. De Pauw University, 116 Ky. 671, 678, 76 S. W. 851, 25 Ky. Law Rep. 950.

[22] 1905, Minot v. Parker, 189 Mass. 176, 180, 75 N. E. 149.

[23] 1922, In re Beekman, 232 N. Y. 365, 134 N. E. 183, 186.

[1] 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 372, 204 App. Div. 664.

poor relatives to the status of paupers.[2] Gifts in favor of deserving poor and needy relatives have been upheld in a number of cases.[3] It should not, however, be overlooked that relatives form a much wider class than do descendants. While the failure of issue and the termination of the line of lineal descent is comparatively common, the ancestors of every person are indefinitely numerous, and there can, therefore, be no failure of collateral relatives except such as may arise from the impossibility of tracing the descent of the testator.[4] Courts, however, have not regarded this distinction as essential, but have recognized a class so narrow as to consist of the descendants of testator's parents,[5] of his brothers and sisters and their children,[6] and of his needy heirs at law.[7] It may be admitted that this is coming very close to the line. Where a gift is made to aid and support those of testator's children and their descendants who may be destitute, none such descendants may ever exist, at least not within any period of time when their connection with the testator can be established.[8]

§ 432. **Distinction between Gift to Charity and Gift to Trustee for a Charity.** The difficulties thrown into the paths of donors by those courts which require them at their peril to designate a class of beneficiaries and do not permit them to leave such designation to their trustees are apparent. Such a requirement has, therefore, not generally been insisted on. Many courts have greatly widened the discretion which may be reposed in trustees, though they do not allow it to encompass non-charitable purposes,[9] nor do they construe such a discretion out of mere indefinite indications that the

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[2] 1919, In re Moller, 178 N. Y. Supp. 682.

[3] 1865, Drew v. Wakefield, 54 Me. 291, 296; 1869, Swasey v. American Bible Society, 57 Me. 523, 526; 1887, Gafney v. Kenison, 64 N. H. 354, 356, 10 Atl. 706; 1901, Funk's Estate, 16 Pa. Super Ct. 434.

[4] 1886, Kent v. Dunham, 142 Mass. 216, 219, 7 N. E. 730, 56 Am. Rep. 667.

[5] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed.) 305, 349, 350.

[6] 1830, Bull v. Bull, 8 Conn. 48, 20 Am. Dec. 86.

[7] 1889, Bronson v. Strouse, 57 Conn. 147, 151, 17 Atl. 699; 1886, Webster v. Morris, 66 Wis. 366, 393, 28 N. W. 353, 57 Am. Rep. 278.

[8] 1886, Kent v. Dunham, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667.

[9] 1902, In re Schleicher, 201 Pa. 612, 51 Atl. 329.

donor wishes certain property to be devoted to charity. A gift "to be used for charitable purposes," fixing on no special object and indicating no plan, and delegating no discretion, is obviously so vague, indefinite and uncertain as not to admit of judicial administration.[10] A trust "for the advancement and benefit of the Christian religion" is too indefinite to be carried out in the absence of a provision giving power to a trustee to fill in the blanks.[11] The same result has been reached in other cases where a large class was named but no trustee was appointed.[12] There is, therefore, a wide distinction between a gift to charity and a gift to a trustee to be applied to charity.[13] Though, as a general rule, equity will not permit a trust to fail for the want of a trustee, an attempted gift direct to a certain class without giving anyone the power to select the individuals of such class to be benefited is void[14] not so much because no trustee is appointed, but rather because no discretion is vested in anyone.

§ 433. **Wide Discretion vested in Trustees.** The situation is entirely changed where such a trustee is appointed with the necessary power to make the proper selection. Though the charity does not fix itself upon any particular object, but is general and indefinite, if certain or ascertainable trustees are appointed with full powers to select the beneficiaries and devise a scheme or plan, the courts will, through such trustees, execute the charity.[15] It certainly is competent for a testator to bestow a charity on a person or institution to be chosen by a trustee or executor.[16] A charity which would otherwise fail for indefiniteness may, therefore,

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[10] 1912, Booe v. Vinson, 104 Ark. 439, 445, 149 S. W. 524; 1886, Webster v. Morris, 66 Wis. 366, 395, 28 N. W. 353, 57 Am. Rep. 278.

[11] 1874, Miller v. Teachout, 24 Ohio St. 525.

[12] 1909, Ingraham v. Sutherland, 89 Ark. 596, 117 S. W. 748; 1881, Hughes v. Daly, 49 Conn. 34; 1883, Fairfield v. Lawson, 50 Conn. 501, 513, 47 Am. Rep. 669; 1858, Beall v. Drane, 25 Ga. 430, 442; 1871, Grimes v. Harmon, 35 Ind. 198, 225, 226, 9 Am. Rep. 690; 1892, Brennan v. Winkler, 37 S. C. 457, 463, 16 S. E. 190; 1888, In re Hoffen, 70 Wis. 522, 36 N. W. 407.

[13] 1901, Haynes v. Carr, 70 N. H. 463, 480, 49 Atl. 638.

[14] 1911, Robbins v. Boulder County, 50 Colo. 610, 616, 115 Pac. 526.

[15] 1871, Grimes v. Harmon, 35 Ind. 198, 220, 9 Am. Rep. 690.

[16] 1897, Moran v. Moran, 104 Iowa 216, 224, 73 N. W. 617, 65 Am. St. Rep. 443, 39 L. R. A. 204.

be saved because a trustee is appointed to administer it.[17] The vagueness of the trust, or the uncertainty of its beneficiaries in such a case, become immaterial.[18] The necessary certainty is secured by vesting the power of selection or appointment in the trustee.[19] "It is immaterial whether the person to take be in esse or not, or whether the legatees were at the time of the bequest a corporation capable of taking, or not, or how uncertain the object may be, provided there be a discretionary power vested anywhere over the application of testator's bounty to those objects."[20] By the appointment of the trustees and the authority vested in them the testator has provided the means to make his gift sufficiently definite and specific for judicial cognizance.[21] The trustee simply selects the charity and determines the manner in which it shall be administered.[1] It follows that so long as the gift is to a charitable use, the discretion reposed in its trustees may, though, of course, it need not, be co-extensive with the disposing power of the donor himself.[2] The argument that such a result allows the trustees or executors to make a will for the testator does not impress the courts which take this view. They proceed on the theory that what a person "may do himself he may do by agent while living, or by executor after death."[3] A gift to the bishop of a certain diocese to be applied to such charitable purposes of the diocese as he may deem fitting has, therefore, been up-

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[17] 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. (3 Heisk.) 668, 672, 677, 11 S. W. 825, 4 L. R. A. 699. But see 1916, Simmons v. Hunt, 171 Ky. 397, 188 S. W. 495, holding that a will as follows: "Everything else I own goes to charity. I leave that to my brother Sam to give out," is void under the Kentucky statute.

[18] 1876, Lawrence County v. Leonard, 83 Pa. 206, 211, 34 Leg. Int. 104.

[19] 1907, Welch v. Caldwell, 226 Ill. 488, 498, 80 N. E. 1014; 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 812, 84 N. W. 273, 83 Am. St. Rep. 553.

[20] 1827 Witman v. Lex, 17 S. and R. 88, 93, 17 Am. Dec. 644 (Pa.); 1858, Appeal of Domestic and Foreign Missionary Society, 30 Pa. (6 Casey) 425, 435; 1870, Zeisweiss v. James, 63 Pa. (13 P. F. Smith) 465, 468, 3 Am. Rep. 558.

[21] 1872, Newson v. Starke, 46 Ga. 88, 95.

[1] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 376, 377.

[2] 1884, In re Kinike, 11 Pa. Co. Ct. Rep. 232 (Affirmed 155 Pa. 101, 25 Atl. 1016); 1918, In re Welch, 172 N. Y. Supp. 349, 105 Misc. 27.

[3] 1907, In re Dulles, 218 Pa. 162, 163, 67 Atl. 49, 12 L. R. A. (N. S.) 1177. See 1887, Claypool v. Norcross, 42 N. J. Eq. 545, 9 Atl. 112 (Reversed 1888, Norcross v. Murphy, 44 N. J. Eq. 522, 14 Atl. 903).

held.[4] That the charitable associations are not specified, does not defeat the gift.[5]

§ 434. **Illustrations of wide Discretion.** It will not be difficult to illustrate the unlimited range which charitable gifts may take, provided that trustees with discretionary power are appointed. Gifts to such unlimited charitable purposes as the trustees may deem best,[6] or which they may select,[7] or determine upon,[8] or think proper,[9] or deem most useful,[10] or desirable,[11] or which they judge will do the most real good,[12] or which they see fit in their discretion to employ,[13] have been upheld on the ground that the fact that the trustees are given absolute discretion to select any legal charity does not make the gift ineffective,[14] but that it is competent for a donor to devise property to them with power to select the object or objects upon which the charity is to be bestowed.[15] A devise to a bishop or his successor for some charity according to his judgment, but expressing a preference for an orphanage has, therefore, been upheld.[16]

§ 435. **Discretion need not be unlimited.** Of course, such discretion need not actually be unlimited. The testator may limit it to certain classes[17] such as the poor without limit,[18] or the friendless poor of all denominations,[19] or the poor of a certain state,[20] or the poor of a certain church,[1] or to the

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[4] 1918, Monaghan v. Joyce, 103 Atl. 582 (Del. Ch.).

[5] 1921, Prime v. Harmon, 120 Me. 299, 113 Atl. 738, 740. See also 1921, King v. Rockwell, 93 N. J. Eq. 46, 115 Atl. 40.

[6] 1890, Powell v. Hatch, 100 Mo. 592, 14 S. W. 49.

[7] 1883, Given v. Shouse, 5 Ky. Law Rep. 419.

[8] 1883, Quinn v. Shields, 62 Iowa 129, 141, 17 N. W. 437, 49 Am. Rep. 141.

[9] 1888, Minot v. Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. Rep. 713.

[10] 1855, Wells v. Doane, 69 Mass. (3 Gray) 201.

[11] 1915, Kimberly's Estate, 249 Pa. 483, 487, 95 Atl. 86.

[12] 1907, Selleck v. Thompson, 28 R. I. 350, 354, 67 Atl. 425.

[13] 1901, In re Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

[14] 1907, Welch v. Caldwell, 226 Ill. 488, 498, 80 N. E. 1014.

[15] 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 804, 84 N. W. 273, 83 Am. St. Rep. 553.

[16] 1900, St. James Orphan Asylum v. Shelby, supra.

[17] 1898, Staines v. Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788.

[18] 1903, Grant v. Saunders, 121 Iowa 80, 86, 95 N. W. 411, 100 Am. St. Rep. 310.

[19] 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 335, 84 N. E. 256, 122 Am. St. Rep. 169.

[20] 1901, Haynes v. Carr, 70 N. H. 463, 480, 49 Atl. 638.

[1] 1859, McLoughlin v. McLoughlin, 30 Barb. 458, 470 (N. Y.).

charitable purposes of a diocese,[2] or the indigent, needy and meritorious widows and orphan children of a certain town.[3] He may restrict the benefit of an educational trust to the indigent orphan children of a certain county,[4] to children of poor parentage in such county,[5] to colored children without reference to any locality,[6] and to Indian and African children and youth in the United States,[7] and to white children between the ages of six and twenty-one years, preferably from a certain district.[8] He may leave his class unlimited except as to locality,[9] or may disregard geographical considerations entirely.[10] He may confine his gift to charitable institutions, either absolutely[11] or by limiting them to a city such as St. Louis,[12] or to a particular purpose such as the improvement and education of the colored people of the South,[13] or the particular activities of a certain church,[14] or the dissemination of the gospel at home and abroad,[15] or the furnishing of a retreat and home for disabled or aged and infirm and deserving American mechanics.[16] He may create a trust for the furtherance of the broadest interpretation of metaphysical thought,[17] for the general advancement of Christianity,[18] or for the benefit of the Christian religion.[19] A gift to four natural persons for "the cause of Christ,"

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[2] 1918, Monaghan v. Joyce, 103 Atl. 582 (Del. Ch.).

[3] 1886, Camp v. Crocker, 54 Conn. 21, 5 Atl. 604.

[4] 1896, Sawtelle v. Witham, 94 Wis. 412, 414, 69 N. W. 72.

[5] 1888, Newton Academy v. Bank of Ashville, 101 N. C. 483, 8 S. E. 174.

[6] 1906, Hunt v. Edgerton, 29 Ohio Cir. Ct. Rep. 377, 382, 19 Ohio Cir. Ct. Dec. 377 (Affirmed 75 Ohio St. 594, 80 N. E. 1126).

[7] 1861, Appeal of Treat, 30 Conn. 113, 116.

[8] 1920, Kirtley v. Spencer, — — Tex. Civ. App. ——, 222 S. W. 328.

[9] 1894, Sappington v. Sappington School Fund, 123 Mo. 32, 42, 27 S. W. 356.

[10] 1913, In re Cleven, 161 Iowa 289, 294, 142 N. W. 986. But see 1911, Collins v. Davis, 17 Ohio C. C. Rep. (N. S.) 221 (Affirmed 87 Ohio St. 504, 102 N. E. 1122).

[11] 1893, In re Kinike, 155 Pa. 101, 25 Atl. 1016.

[12] 1887, Howe v. Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226.

[13] 1907, Godfrey v. Hutchins, 28 R. I. 517, 520, 68 Atl. 317.

[14] 1919, Kratz v. Slaughter, 185 Ky. 256, 214 S. W. 878.

[15] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 617.

[16] 1893, Hayes v. Pratt, 147 U. S. 557, 567, 37 L. Ed. 279, 13 S. C. Rep. 503.

[17] 1916, Vineland Trust Co. v. Westendorf, 86 N. J. Eq. 343, 98 Atl. 314.

[18] 1914, Sandusky v. Sandusky, 261 Mo. 351, 358, 168 S. W. 1150.

[19] 1874, Miller v. Teachout, 24 Ohio St. 525.

by them to be "sacredly appropriated to the cause of religion as above stated, to be distributed in such divisions and to such societies and religious charitable purposes as they may think fit and proper," sufficiently indicates the general objects to bind the conscience of the trustees and to render them liable in equity to account for the execution of the trust, while its object is sufficiently certain and definite to be carried into effect according to the established principles of law and equity, governing donations to charitable uses.[20] The donor may leave the selection of the church or churches of a certain denomination in a certain state,[1] of the school in connection with which a certain scholarship is to be established,[2] of the particular person to be educated as a clergyman,[3] the particular mode of appropriating his bounty,[4] and certainly the details connected with the administration of his charity[5] to his trustees, and may confer power on them to declare the trust at an end if it cannot be executed substantially, or if at any time it shall become inoperative or impracticable by change of custom, process of law, or otherwise.[6]

§ 436. **Louisiana Rule.** To what has been said, the state of Louisiana forms an exception. No trustee in the common law sense is there recognized, and such non-recognition has, of course, extended to the discretion customarily vested in trustees. It has, therefore, been held that where a testator "desires" his executors to use the residue of his estate "for any charitable institution they may select or think of benefiting," such direction violates the provisions concerning substitutions and **fidei commissa**, and is void as "willing by testament by the intervention of a commissary or attorney in

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[20] 1834, Going v. Emery, 33 Mass. (16 Pick.) 107, 119, 26 Am. Dec. 645.

[1] 1883, Jones v. Habersham, 107 U. S. 174, 182, 27 L. Ed. 401, 2 S. C. Rep. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

[2] 1905, Speer v. Colbert, 200 U. S. 130, 147, 50 L. Ed. 403, 26 S. C. Rep. 201 (Affirming 24 App. D. C. 187).

[3] 1901, Young v. St. Mark's Lutheran Church, 200 Pa. 332, 336, 49 Atl. 887.

[4] 1873, McAllister v. McAllister, 46 Vt. 272, 280.

[5] 1912, **In re** Creighton, 91 Neb. 654, 663, 136 N. W. 1001, Ann. Cas. 1913 D. 128.

[6] 1891, Lewis Estate, 11 Pa. Co. Ct. Rep. 561, 1 Pa. Dist. Ct. Rep. 423 (Affirmed 152 Pa. 477, 25 Atl. 878).

fact.''[7] A gift to trustees in trust for such charitable uses and purposes in Ireland, as they in their discretion shall think fit,'' though valid in the common law domicile of the testator, and hence good in regard to all his personal property wherever situated, is invalid as to his real estate in Louisiana.[8] Similarly, a bequest of such an amount as the executors of the will shall think proper for the purpose of erecting a memorial window in a certain church has been held to be invalid in the state.[9]

§ 437. **Summary. Discretion limited to Charities.** A discretion, express or implied, may and usually is vested by donors in their trustees or in other persons to select the charity itself, or at least to appoint the beneficiaries of it. Such discretion must be limited by the terms of the will, and not by vague references to verbal directions given by the testator to his appointees. It must further be confined to a charitable purpose in the strict sense of the word and may not be extended to comprise mere benevolence, liberality, or generosity, however praiseworthy such objects may be. Though the courts are inclined to uphold gifts in which such non-technical terms are used, by limiting them to charitable purposes in the strict sense, their use should be avoided as such terms breed disagreeable litigation which may be disastrous, whether it is successful or not. The mere fact that the trustees have confined their selection to a charitable purpose will be of no consequence on the question of the validity of the original power.

§ 438. **Summary. Court Action.** The power conferred will, in the first instance, have to be exercised by the appointees themselves, and will not, in the absence of fraud or breach of duty on their part, be taken over by the courts while such appointees are capable of acting as contemplated by the testator. Whether or not it will be taken over in any case, will depend on the intention of the donor. Where nothing but a personal power has been confided to the appointees, such power will expire with them and will not be

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[7] 1899, Succession of Burke, 51 La. Ann. 538, 25 So. 387.

[8] 1900, Succession of McCloskey, 52 La. Ann. 1122, 27 So. 705.

[9] 1900, Succession of McCloskey, supra. But see Chapter 2, Section 85 for a modification of this Louisiana view.

conferred by the courts on any other persons. Where, on the other hand, a technical trust rather than a mere power was intended, it will be executed even after the death or disability of such appointees. Where the testator's intentions are doubtful, courts will incline toward construing a trust rather than a power out of his words.

§ 439. **Summary. Latitude of Discretion.** While all the authorities agree that the discretion confided in trustees or others must not go beyond the confines of charity, the question whether this discretion may be made co-extensive with the vast field of charity, or whether it must be confined within narrower limits, has divided the courts into two camps. The attempt to limit this discretion made by a number of states has not resulted in any definite rule by which limits may be fixed, and is, in its very nature, incapable of producing such a result. The leading state of New York, after considerable experimentation with such limitation, has, therefore, abandoned all such attempts, and has gone over to the other side of the controversy, thus adapting itself both to the better reasoning and the greater weight of authority.

§ 440. **Summary. Basis of Classification.** While in the majority of the states a donor may leave his trustees at liberty to select from the entire field of charity, it is clear, beyond any controversy, that he need not do so, but on the contrary may confine their discretion within narrower limits. He may, in other words, create a class of beneficiaries which may be limited by age, or sex, or occupation, may be large, medium, or small, and may make race, nationality, religion, politics, or any other reasonable or unreasonable requirement, or any combination of them the deciding factor.

CHAPTER XI

TRUSTEES

§ 451. **Importance.** While the **cestui que trustent,** or equitable owners, are the most important persons in the trust relation, the trustees, or legal owners, are persons of no small consequence, particularly where the trust is a charitable one. The very nature of a charity makes it a continuing executory trust. The trustee always has something to do, not only in protecting the title and ascertaining the objects, but also in improving the property and determining the beneficiaries.[1] While a charity may subsist and cling to land, whether the legal title be held by trustees or by the heirs,[2] while it is the use and not the person who administers it, that affords the test,[3] while, therefore, a trustee is not absolutely necessary to the validity of a well-defined charitable trust,[4] the importance of appointing proper persons as trustees is obvious. The vaguer the trust, the greater will be the discretion reposed in its trustees, and the more important will be the matter of their proper selection.

§ 452. **Personal Trustee. Objection.** No matter how careful a testator in the appointment of personal trustees may be, he cannot provide for all the contingencies that may happen. His appointees may die, or become insane, or insolvent, or may refuse to accept the trust, or may in some other way become incompetent to administer it. In all cases where the trust extends over a long period of time, some of these events must come to pass. Some remedy must exist, or many worthy trusts will fall to the ground. Thus, in Oregon, six Christian Science churches were appointed as trustees of a maternity home for unfortunate or wayward

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[1] 1882, Beckwith v. St. Philip's Parish, 69 Ga. 564, 571.

[2] 1840, Miles v. Fisher, 10 Ohio 1, 3, 36 Am. Dec. 61.

[3] 1908, Corin v. Glenwood Cemetery, 69 Atl. 1083, 1084 (N. J.).

[4] 1865, Levy v. Levy, 33 N. Y. 97, 121. But see 1919, Robinson v. Crutcher, 277 Mo. 1, 209 S. W. 104, which holds that a gift direct to the school fund of a town, county, or state cannot be upheld as a charity, since there is no separation of the legal and equitable estates indicated by the donor.

girls. Out of religious scruples they could not maintain such an institution. Clearly, their inability to act should not bring about a failure of the charity.[5]

§ 453. **Appointment by Court. Generally.** The courts have not been slow in devising the remedy. Wherever it has appeared to them that a sufficiently definite trust existed, they have not allowed it to fail for the want of a trustee,[6] but have appointed trustees where such action was necessary,[7] and have not permitted the administrator **de bonis non with the will annexed** to control it.[8] They have refused to allow a gift to fail because no trustee was appointed[9] by the donor's executor.[10] Even though it was not clear whether a local or general church was intended as trustee, the trust has not been allowed to fail on account of this ambiguity.[11] A trustee has been appointed in the state in which the interest of a fund was to be expended, though there was a trustee in the state in which the fund was administered.[12] In making such appointments, the courts will conform, as nearly as possible, to the will of the donor, even in reference to the manner of appointing,[13] or the number of trustees,[14] and

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[5] 1923, Weme v. First Church of Christ Scientist, —— Or. ——, 219 Pac. 618, 628.

[6] 1862, Williams v. Pearson, 38 Ala. 299, 307; 1861, Appeal of Treat, 30 Conn. 113, 117; 1898, Grand Prairie Seminary v. Morgan, 171 Ill. 444, 452, 49 N. E. 516 (Affirming 70 Ill. App. 575); 1889, Penny v. Croul, 76 Mich. 471, 476, 43 N. W. 649, 5 L. R. A. 858; 1922, Elliott v. Quinn, —— Neb. —— 189 N. W. 173; 1914, Case v. Hasse, 83 N. J. Eq. 170, 176, 177, 93 Atl. 728; 1909, Hagen v. Sacrison, 19 N. D. 160, 181, 123 N. W. 518, 26 L. R. A. (N. S.) 724; 1853, Urmay v. Wooden, 1 Ohio St. 160, 166, 59 Am. Dec. 615; 1829, McGirr v. Aaron, 1 Pen and W. 49, 52, 21 Am. Dec. 361 (Pa.); 1850, Calhoun v. Furgeson, 3 Rich. Eq. 160, 162 (S. C.); 1880, Carleton v. Roberts, 1 Posey Unreported Cas. 587, 591 (Tex.). But see 1880, Reeves v. Reeves, 73 Tenn. (5 Lea) 644, 649. A gift for the worn-out preachers of a certain conference, without the appointment of a trustee, has been upheld. 1916, Buckley v. Monck, 187 S. W. 31, 34 (Mo.).

[7] 1847, McBride v. Elmer, 6 N. J. Eq. (2 Halst. Ch.) 107; 1906, Tincher v. Arnold, 147 Fed. 665, 672, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[8] 1921, **In re** Anderson, 269 Pa. 535, 112 Atl. 766.

[9] 1918, White v. Newark, 89 N. J. Eq. 5, 103 Atl. 1042; 1845, Bailey v. Kilbourn, 51 Mass. (10 Meet. 176.

[10] 1921, Prime v. Harmon, 120 Me. 299, 113 Atl. 738, 740.

[11] 1899, Keith v. Scales, 124 N. C. 497, 509, 32 S. E. 809. But see 1923, Tharp v. Smith, —— Wis. ——, 195 N. W. 331.

[12] 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 327, 120 S. W. 283.

[13] 1885, Pierce v. Weaver, 65 Tex. 44, 47, 48.

[14] 1832, Massachusetts General Hospital v. Armory, 29 Mass. (12 Pick.) 445.

are influenced in their choice by the nature of the charity.[15] They will, where a gift is to an unincorporated society, appoint such society after it had become a corporation,[16] will allow an unincorporated congregation which was appointed as trustee to elect a person for the court to affirm,[17] and will appoint the church corporation, with which an unincorporated Sunday school is connected, as trustee for it.[18] They, of course, will not act until the necessity has arisen. It has, therefore, been held in New York, under the Tilden act of 1893, that, so long as any of the appointed trustees survive, they, and not the supreme court, are charged with the duty of executing the trust.[19]

§ 454. **Incapacity of Trustee.** It not infrequently happens that the trustee selected by the testator is without legal power to act. The situation in such cases is clear. In charitable gifts it is immaterial that the trustee is uncertain or incapable of taking, or incompetent to act,[20] for if the trust is valid, it will not be allowed to fail for the want of a capable trustee.[21] "If the trust be one, over which the constituted authorities of the country can exercise jurisdiction, they will not permit it to be defeated because of incapacity in the designated trustees to take the property, but will fasten the trust upon the property and make or imply trustees, or take other effectual means to cause it to be executed."[22] They will change the method of giving perpetual effect to a charitable gift where such method has become inoperative.[23] "A gift to the lame, the halt, and the blind, is not to fail in the nineteenth century because the legal title is given to a person or corporation incapable of taking it,

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[15] 1905, Bowman v. Domestic and Foreign Missionary Society, 182 N. Y. 494, 498, 75 N. E. 535.

[16] 1858, Preachers' Aid Society v. Rich, 45 Me. 552, 559; 1905, Wood v. Fourth Baptist Church, 26 R. I. 594, 602, 61 Atl. 279.

[17] 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 109, 1 Rich. Law 176 note (S. C.).

[18] 1876, Mason v. Tuckerton M. E. Church, 27 N. J. Eq. (12 C. E. Green) 47, 50.

[19] 1907, Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

[20] 1911, Smith v. Gardiner, 36 App. D. C. 485, 486; 1913, Smart v. Durham, 77 N. H. 56, 60, 86 Atl. 821.

[21] 1847, Sohier v. St. Paul's Church, 53 Mass. (12 Met.) 250; 1893, Conklin v. Davis, 63 Conn. 377, 383, 28 Atl. 537.

[22] 1842, Holland v. Peck, 37 N. C. (2 Ired. Eq.) 255, 258.

[23] 1888, Newton Academy v. Bank of Asheville, 101 N. C. 483, 488, 8 S. E. 174.

or even forbidden by law to take it."[1] This applies not only to individuals such as the trustees of an unincorporated society,[2] the heirs of the testator entrusted with the management of his personal property,[3] an unincorporated society,[4] or the members of a charitable society about to dissolve,[5] but also to corporations, whether they are private entities such as an insurance company made the trustee of an insane asylum,[6] or a foreign corporation incapable to take under the laws of the state,[7] or the American Colonization Society made the trustees of certain slaves with a view to their manumission,[8] or a charitable corporation,[9] a quasi corporation,[10] or the "mother church" of the Christian Science denomination in trust, but in excess of its charter power to take,[11] and to public corporations such as counties appointed as trustees for school purposes,[12] or school districts appointed as trustees for church purposes,[13] or townships entrusted jointly with property for charitable purposes,[14] or to a theological faculty of a French seminary, which was a part of the state government at the time the will was made but had, by the French separation law, lost such connection at the time it went into effect,[15] or cities where the trust, though unexceptional in itself, is incompatible with their proper purposes.[16] It has been held that, where a city is made the trustee of a charity for the benefit of a certain class of beneficiaries, its refusal to act on account of its lack of power

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[1] 1892, Frazier v. St. Luke's Church, 147 Pa. 256, 261, 23 Atl. 442.

[2] 1899, In re Upham, 127 Cal. 90, 94, 59 Pac. 315.

[3] 1888, Newton Academy v. Bank of Asheville, 101 N. C. 483, 488, 8 S. E. 174.

[4] 1907, Guild v. Allen, 28 R. I. 430, 435, 67 Atl. 855. Contra 1865, White v. Hale, 42 Tenn. (2 Cold.) 77, 82.

[5] 1838, Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392.

[6] 1913, Richards v. Church Home for Orphan and Destitute Children, 213 Mass. 502, 100 N. E. 631.

[7] 1918, Gould v. Board of Home Missions, 102 Neb. 526, 167 N. W. 776.

[8] 1858, Walker v. Walker, 25 Ga. 420. This, however, was not a case involving a charitable trust.

[9] 1902, Eliot's Appeal, 74 Conn. 586, 598, 51 Atl. 558.

[10] 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. (3 Pickle) 668, 11 S. W. 825, 4 L. R. A. 699.

[11] 1912, Chase v. Dickey, 212 Mass. 555, 567, 99 N. E. 410.

[12] 1910, Chapman v. Newell, 146 Iowa 415, 427, 125 N. W. 324.

[13] 1858, Chapin v. School District, 3 Ohio Dec. 321.

[14] 1876, Mason v. Tuckerton M. E. Church, 27 N. J. Eq. (12 C. E. Green) 47, 53.

[15] 1912, In re Miller, 133 N. Y. Supp. 828, 149 App. Div. 113.

[16] 1844, Vidal v. Girard, 43 U. S. (2 How.) 127, 188, 11 L. Ed. 205.

to accept the gift will not defeat it, though the donor had provided that "should any of the trusts not be accepted" they should be ratably distributed among the other gifts.[17] Where, therefore, a charitable trust is inconsistent with or repugnant to the proper purposes for which the corporation-trustee is created, such trust will not be void for that reason, but a new trustee will be substituted by the proper court.[18]

§ 455. **Refusal.** Trustees appointed by testators have refused to act. They, of course, may decline the burden placed on them, even though a city acts as trustee.[19] It is equally clear that the validity or invalidity of the trust will not depend upon the will of the trustee thus expressed,[20] unless indeed the testator has intended a personal trust.[21] Where, therefore, the intent to devote the whole residue of an estate to charity is expressed absolutely, and an intent to devote a portion of it to a specific purpose is made contingent on the acceptance by the trustee appointed by the testator, and it is provided that on his refusal such portion is to be ratably distributed among the other specific charities, the court will not appoint a new trustee where the testamentary appointee has refused the bequest.[1] Where, however, as is usually the case, the continuance of a charitable trust is in no way dependent on the acceptance of the trustee,[2] the fact that he refuses to accept the trusteeship,[3] or refuses to select the beneficiaries,[4] does not defeat the charity, but merely brings the power of the court to appoint another trustee into action.[5] The refusal of a trustee to act

17 1891, Dailey v. New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

18 1857, Chapin v. School District, 35 N. H. 445, 454; 1858, Chapin v. School District, 3 Ohio Dec. 321.

19 1891, Dailey v. New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

20 1888, Holland v. Alcock, 108 N. Y. 312, 323, 16 N. E. 305, 2 Am. St. Rep. 420, 20 Abb. N. C. 447; 1896, Sawtelle v. Witham, 94 Wis. 412, 416, 69 N. W. 72.

21 1912, Glover v. Baker, 76 N. H. 393, 404, 83 Atl. 916.

1 1896, In re Yale College, 67 Conn. 237, 34 Atl. 1036.

2 1911, Richardson v. Essex Institute, 208 Mass. 311, 316, 94 N. E. 262.

3 1847, State v. Griffith, 2 Del. Ch. 392, 398, 399; 1894, Phillips v. Harrow, 93 Iowa 92, 107, 61 N. W. 434; 1916, Winslow v. Stark, 78 N. H. 135, 97 Atl. 979, 981.

4 1922, Washington Loan and Trust Co. v. Hammond, 278 Fed. 569.

5 1891, Dailey v. New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; 1894, Phillips v. Harrow, supra; 1892, Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 283, 23 Atl. 781.

cannot divert a trust fund from its legitimate objects and defeat both the will and charity of the donor.[6] A gift to trustees for specific charitable uses, if not accepted, does, therefore, not revert to the donor's heirs or residuary legatees, but will be applied to the purposes of the charity, through new trustees.[7] The refusal of a city to accept a hospital,[8] or the refusal of a town to accept a benefit to its cemetery except on condition that testator's unsold lots be conveyed to it,[9] or the refusal of the trustee to select the proper object of the charity[10] or its beneficiaries,[11] will not defeat the trust. Where the trustee refuses to assume the trust on account of certain conditions annexed to it, and no one can be found who is willing to assume the burden, such method of administration will be adopted as will carry out testator's intentions in view of the changed conditions.[12]

§ 456. **Failure to Act.** What is true in regard to a refusal to act, holds good where a trustee fails, or for any reason whatsoever is unable to act. Where, therefore, a gift is made to the superintendent and trustees of public schools, and such municipal body is superseded by another municipal corporation which is unable to make the trust effective, the trustees of the public library of the city may be appointed as trustees.[13] Where a park for colored people is an utter failure on account of financial difficulties, the court may appoint the city, within whose boundaries it is located, as trustee.[14] Under a bequest to the "Dorcas Society of Trenton" for the poor of the city, the Trenton Society for Organized Charity may take where the Dorcas Society has gone out of existence.[15] A trust, created by subscriptions for the purpose of buying the arsenal grounds in Indianapolis for

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[6] 1848, Griffith v. State, 2 Del. Ch. 421, 456.

[7] 1832, American Academy v. Harvard College, 78 Mass. (12 Gray) 582; 1923, Weme v. First Church of Christ Scientist, —— Or. ——, 219 Pac. 618.

[8] 1913, Dykeman v. Jenkines, 179 Ind. 549, 557, 558, 101 N. E. 1013, Ann. Cas. 1915 D. 1011.

[9] 1901, Campbell v. Clough, 71 N. H. 181, 183, 51 Atl. 668.

[10] 1885, Mills v. Newberry, 112 Ill. 123, 134, 1 N. E. 156, 54 Am. Rep. 213.

[11] 1888, Appeal of Goodrich, 57 Conn. 275, 285, 18 Atl. 49.

[12] 1901, Rollins v. Merrill, 70 N. H. 436, 437, 48 Atl. 1088.

[13] 1902, Lanning v. Commissioners of Public Instruction, 63 N. J. Eq. 1, 51 Atl. 787.

[14] 1917, Woods v. Bell, 195 S. W. 902, 910 (Tex. Civ. App.).

[15] 1906, Trenton Society v. Howell, 63 Atl. 1110 (N. J.).

a technical school, will not be defeated by the failure of the corporation intended as trustee, but will be carried out by appointing as trustee the public body in charge of the school system of the city.[16] Where the corporation donee of a gift has gone out of existence by the expiration of its charter, its successor corporation will receive the gift on the theory that the orphans taken care of by it are the real beneficiaries, and that equity sees the same orphan asylum behind the new corporate name.[17] Where a joint scheme for charity is contemplated by the makers of two wills who are sisters, and practically the same disposition is made by each instrument, it will be enforced as a whole. That there are different trustees does not involve insuperable difficulties as one or the other may be removed.[18] Where the pastor of a certain church is appointed by name, but dies, the court will appoint his successor, in the ministry of the church, as trustee.[19]

§ 457. **Permanent Charity. Implied Power to appoint.** Where a perpetual trust is created, the donor necessarily contemplates that no one personal trustee, or body of trustees, will be able to fully administer it.[20] From the very nature of the trust, the power of supervision must be exercised by a succession of trustees and cannot be confined to the appointees of the testator.[21] The trust is clearly not a personal one, and will not be defeated by the death or resignation of the appointees,[22] but will merely bring into action the power of the court to appoint their successor.[23] A testator will be presumed to know that, in case of the death or resignation of his trustees, others will be appointed to administer his charity.[24] That two of the three trustees ap-

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16 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 799.

17 1922, In re Scrimger, 188 Cal. 158, 206 Pa. 65.

18 1911, Richardson v. Essex Institute, 208 Mass. 311, 316, 94 N. E. 262.

19 1923, McCarthy v. Walsh, —— Me. ——, 122 Atl. 406.

20 1906, Hunt v. Edgerton, 29 Ohio Cir. Ct. Rep. 377, 380, 19 Ohio Cir. Ct. Dec. 311 (Affirmed 75 Ohio St. 594, 80 N. E. 1126).

21 1904, Colbert v. Speer, 24 App. D. C. 187, 205 (Affirmed 200 U. S. 130, 50 L. Ed. 403, 26 S. C. Rep. 201).

22 1905, Speer v. Colbert, 200 U. S. 130, 145, 50 L. Ed. 403, 26 S. C. Rep. 201 (Affirming 24 App. Dist. Col. 187).

23 1903, Loyd v. Webster, 117 Ga. 775, 45 S. E. 77; 1875, Cruse v. Axtell, 50 Ind. 49, 56.

24 1897, Duggan v. Slocum, 83 Fed. 244 (Affirmed 92 Fed. 806, 34 C. C. A. 676). See 1876, American Tract Society v. Atwater, 30 Ohio St. 77, 89, 27 Am. Rep. 422.

pointed to execute a charity have died, will, therefore, not avoid the gift.[1] A charity subject to a life estate is not defeated by the death of the trustee during the life of the life tenant.[2] A charitable trust to six trustees is not terminated by the death of three of them,[3] as vacancies may be filled by the court.[4] A discretion reposed in two persons to apply the gift to "like good objects" may be exercised by one of them after the other has passed away.[5] Equity will not, after the individual trustees of a charity are dead, and the town trustee has become a city, suffer the charity to fail for the want of a trustee,[6] but will enforce a trust even after all the original trustees have long since passed away.[7] Nor will the action of the courts be confined to the selection of trustees who have died, resigned, or have otherwise become incapacitated, but extends to the removal of an offending trustee and to the appointment of his successor.[8] The removal of a refractory trustee and the substitution of a more willing one in his place is a more efficient remedy than immediate compulsion.[9] Even the legislature may accomplish the same result. "The general assembly may, by an act, so transfer the legal title to land held in trust for public purposes from one body or set of persons holding the legal title, to another body or set of persons, or to a particular corporation, to hold the land for the same purposes and under the same trusts, and in such cases an actual conveyance of the legal title is unnecessary."[10]

§ 458. **Non-existence.** The imagination of donors sometimes outruns their knowledge and results in the appointment of trustees who do not exist. The legal situation in such a case is the same as where the trustee has died, re-

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[1] 1898, Garrison v. Little, 75 Ill. App. 402, 416.

[2] 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 209, 79 S. W. 831.

[3] 1896, Spence v. Widney, 46 Pac. 463, 464 (Cal.).

[4] 1912, Spring Green Church v. Thornton, 158 N. C. 119, 123, 73 S. E. 810.

[5] 1919, Coffin v. Attorney General, 231 Mass. 579, 121 N. E. 397.

[6] 1865, Meeting Street Baptist Society v. Hail, 8 R. I. 234.

[7] 1862, White School House v. Post, 31 Conn. 240; 1905, Thompson v. Hale, 123 Ga. 305, 311, 51 S. E. 383.

[8] 1895, State v. Ausmus, 35 S. W. 1021, 1023 (Tenn.).

[9] 1841, Morrison v. Beirer, 2 W. and S. 81, 87 (Pa.).

[10] 1911, Roe and Wright v. Seaford, 25 Del. (2 Boyce) 348, 352, 80 Atl. 250.

signed, or has otherwise been incapacitated. The trust will not be permitted to fail, but will be administered by the courts who will devise a scheme and appoint instrumentalities for its management.[11] On this principle, gifts to a "missionary committee"[12] or to a board of missions[13] have been upheld and carried out, though there was no such body.

§ 459. **No Trustee appointed.** The express appointment of trustees is desirable, but not essential. Trustees are the mere instruments of distribution—the hand, as it were, to parcel out the fund and carry into effect the general intention of the testator.[14] It is natural for the charitably inclined to be chiefly solicitous that the beneficiaries receive the assistance intended.[15] Of course, in a case where no trustee is appointed, and the manner in which the gift is to be made effective is not declared, such gift cannot be enforced because the donor's intentions are not sufficiently revealed.[16] Where, however, the subject and object are definitely declared, the trust will not be allowed to fail for the want of a trustee.[17] If the charity is definite enough to be protected from abuse by the appointment of new trustees, it would appear to be sufficiently definite to be saved from failure by the appointment of a trustee in the first instance.[18] Mere delay in the appointment will not defeat it.[19] "If it appears that the donor has made a gift in trust for a particular charitable purpose and appoints no trustee, or the trustee appointed by him is incapable of taking the gift and administering the trust, or if trustees are named or appointed who are not **in esse**, but are to come into existence thereafter, as by an act of incorporation, courts of equity can establish the charity, for a legal and valid trust will not be allowed

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[11] 1891, Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110.

[12] 1892, Frazier v. St. Luke's Church, 147 Pa. 256, 23 Atl. 442.

[13] 1902, Bruere v. Cook, 63 N. J. Eq. 624, 629, 52 Atl. 1001.

[14] 1848, Griffith v. State, 2 Del. Ch. 421, 458.

[15] 1891, Dailey v. New Haven, 60 Conn. 314, 322, 323, 22 Atl. 945, 14 L. R. A. 69.

[16] 1893, Dye v. Beaver Creek Church, 48 S. C. 444, 457, 26 S. E. 717, 59 Am. St. Rep. 724.

[17] 1907, Welch v. Caldwell, 226 Ill. 488, 497, 80 N. E. 1014; 1921, Dupont v. Pelletier, 120 Me. 114, 113 Atl. 11, 13.

[18] 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. (3 Pickle) 668, 673, 11 S. W. 825, 4 L. R. A. 699.

[19] 1879, Sohier v. Burr, 127 Mass. 221.

by such courts to fail for the want of a trustee."[20] The courts may presume that it was the grantor's intention that the estate should remain in the custody and possession of the heirs until wanted for the beneficial purposes prescribed.[21] The clouds which enveloped the minds of the courts during the earlier part of the nineteenth century on the question of the necessity of the appointment by the donor of a trustee have been dispelled, the scales have fallen from the judicial eye, and "the sublime doctrine of scripture that 'charity never faileth' at length prevailed."[1]

§ 460. **Gift to Class direct.** The question, whether a charitable gift direct to the class of beneficiaries without appointing a trustee is valid, has caused some courts to hesitate and others to proceed in the wrong direction. It has been said that "it is quite indispensable to the existence of a trust that the legal title be held by some one other than the **cestui que trustent,** who are incapable, by reason of the indefiniteness which characterizes their personality, of holding it."[2] It has been intimated that courts will not, in the exercise of the **cy pres** power, execute a charitable gift where the testator has not appointed a trustee and clothed him with power to carry out the gift, nor has delegated such authority to the court. Says the New York Court of Appeals in an early case: "As charitable uses, like other uses, comprise a trust as well as a use, it is obvious that they are liable at common law to two classes of defects, one affecting the trust and the other the use. To constitute a valid use, there must be, in all cases, first, a trustee legally competent to take and hold the property; and secondly, a use for some purpose clearly defined."[3] A bequest to the "most deserving poor" of a certain municipality has, therefore, been held void for indefiniteness.[4]

§ 461. **Trust sufficiently definite.** This reasoning applies

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[20] 1906, Inglish v. Johnson, 42 Tex. Civ. App. 118, 122, 95 S. W. 558.

[21] 1821, Shapleigh v. Pilsbury, 1 Me. 271, 289.

[1] 1892, Frazier v. St. Luke's Church, 147 Pa. 256, 260, 261, 23 Atl. 442.

[2] 1888, Mannix v. Purcell, 46 Ohio St. 102, 145, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

[3] 1911, Robbins v. Boulder County, 50 Colo. 610, 618, 619, 115 Pac. 526.

[4] 1856, Owens v. Missionary Society, 14 N. Y. (4 Kern) 380, 406, 67 Am. Dec. 160. See 1881, Hughes v. Daly, 49 Conn. 34.

indeed where the trust is so indefinite that it will be impossible for the courts to determine the will of the donor and carry it into effect. It does not apply, however, where the use is so expressed that the court may judge of the motive which actuated the donor so as to give specific effect to his general directions.[5] In such a case the court will enforce the gift, though no trustee is appointed,[6] the power so to act being implied from the general terms of the will.[7] It will be assumed that the testator intended that the person selected and appointed by the proper court is to carry out his directions.[8] It has, therefore, been held that a gift to the poor of a certain county,[9] or of a certain city,[10] or to a local unincorporated branch of the Salvation Army,[11] or merely for "education of poor children,"[12] or a dedication of property to charitable uses,[13] create valid charities for which trustees will be appointed by the courts. The technical objection, that the legal estate will be in abeyance, is met by holding that the executors or heirs of the donor will, in such cases, become the trustees of those for whose use the gift is intended until the court can act.[14] Where a testator, therefore, has appointed no trustees of his charity, and his executors have been discharged, the court will act within its rights in appointing trustees of the property.[15]

§ 462. **Technical Words not necessary to Appointment.** No particular formulas such as the familiar words "in

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[5] 1916, Buckley v. Monck, 187 S. W. 31, 34 (Mo.).

[6] 1860, Howard v. American Peace Society, 49 Me. 288, 305; 1869, Swasey v. American Bible Society, 57 Me. 523, 528; 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 327, 71 Atl. 1032; 1908, In re Nilson, 81 Neb. 809, 815, 116 N. W. 971; 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 57 (N. Y.).

[7] 1909, Klumpert v. Vrieland, 142 Iowa 434, 439, 121 N. W. 34.

[8] 1911, French v. Lawrence, 76 N. H. 234, 81 Atl. 705.

[9] 1842, State v. Gerard, 37 N. C. (2 Ired. Eq.) 210, 219.

[10] 1909, Klumpert v. Vrieland, supra. Contra 1888, In re Hoffen, 70 Wis. 522, 524, 36 N. W. 407.

[11] 1910, In re Crawford, 148 Iowa 60, 63, 126 N. W. 774, 33 Ann. Cas. 992.

[12] 1813, Hitchcock v. Board of Home Missions, 259 Ill. 288, 301, 102 N. E. 741 Ann. Cas. 1915, B 1 (Reversing 175 Ill. App. 87).

[13] 1836, Bryant v. McCandless, 7 Ohio (7 Han.) Part 2, 135.

[14] 1848, Brown v. Kelsey, 56 Mass. (2 Cush.) 243, 250; 1845, American Bible Society v. Wetmore, 17 Conn. 181, 188.

[15] 1854, Richmond v. State, 5 Ind. 334, 337. See 1885, Richmond v. Davis, 103 Ind. 449, 452, 3 N. E. 130.

trust''[16] are necessary to create the trust relation. The trustees of a charitable trust need not be designated as such, but the trust relation may be inferred from directions to carry out all or a portion of the provisions of the will.[17] Persons, charged with duties beyond those which belong to executors, take as trustees, though that word is not used.[18] Courts will, by construction, imply an estate in trustees, although none is given them in words, where they are required to do something which cannot be done without a legal estate.[19] ''Words of recommendation, request, entreaty, wish or expectation, will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust.''[20] The appointment of a county as trustee may be inferred from a direction to put a fund at interest in the county treasury and apply the interest to the purposes of the charity.[1] A direction that testator's executors are forthwith to obtain a proper charter for the proposed charity impliedly makes them trustees of the charity until such purpose has been accomplished.[2] Executors charged with the execution of a charitable trust become trustees of it and may execute it.[3]

§ 463. **Successors. Appointment.** A donor who appoints personal trustees may, at the time of making his gift,[4] make provision for such successors, and may vest them with the powers bestowed on the original trustees.[5] He may give the

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[16] 1883, Ex parte Schouler, 134 Mass. 426. Citing 1881, Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445.

[17] 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 333, 84 N. E. 256, 122 Am. St. Rep. 169.

[18] 1907, Welch v. Caldwell, 226 Ill. 488, 494, 80 N. E. 1014; 1905, Codman v. Brigham, 187 Mass. 309, 312, 72 N. E. 1008, 105 Am. St. Rep. 394.

[19] 1883, Sowers v. Cyrenius, 39 Ohio St. 29, 36, 48 Am. Rep. 418.

[20] 1876, Schmucker v. Reel, 61 Mo. 592, 596.

[1] 1876, Lawrence County v. Leonard, 83 Pa. 206, 34 Leg. Int. 104.

[2] 1904, In re Daly, 208 Pa. 58, 65, 57 Atl. 180.

[3] 1901, Jones v. Watford, 64 N. J. Eq. 785, 53 Atl. 397 (Reversing on this point 62 N. J. Eq. 339, 50 Atl. 180); 1908, Klemmerer v. Klemmerer, 233 Ill. 327, 332, 84 N. E. 256, 122 Am. St. Rep. 169; 1884, Leeds v. Shaw, 82 Ky. 79, 6 Ky. Law Rep. 26; 1873, Cobb v. Denton, 65 Tenn. (6 Baxt.) 235; 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 209, 79 S. W. 831.

[4] 1885, Pierce v. Weaver, 65 Tex. 44, 47.

[5] 1913, In re Cleven, 161 Iowa 289, 294, 142 N. W. 986.

power to appoint them to certain judges;[6] may direct that on the occurrence of certain events, the original trustees or some of them are to retire and that others be substituted in their places;[7] may confer on his appointees the power to appoint additional trustees;[8] may make the officers of a certain corporation the trustees of his charity, and thus, in effect, give power to the corporation to elect them;[9] may appoint the officers of a certain church and their successors;[10] may limit the trustees to members of two enumerated church societies[11] or to his own descendants, and in case there should be none, to a board created in a manner specifically outlined by him;[12] and may give to the trustee appointed by himself the power to appoint his three colleagues,[13] who, thereupon, will have power to bring actions of ejectment.[14] Where a charity is incorporated, the legislative provision for perpetuating its trustees, of course, will be controlling,[15] and their appointment cannot be vested in the courts even by the legislature itself.[16] The donor must, however, act affirmatively at the time he makes his gift, and cannot, by mere implication, either reserve the power to himself[17] or bestow it on others.[18] If he makes no provision for appointing successors, the courts will appoint them, but will only act on proof that a vacancy exists, and upon notice to all parties in interest, including the trustees named in the will, if they are still alive.[19] Nor is such power of the courts absolutely excluded by provisions made by the testator himself for the appointment of new trustees. While courts ordinarily ap-

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[6] 1896, In re John, 30 Ore. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

[7] 1878, Laird v. Bass, 50 Tex. 412.

[8] 1876, De Bruler v. Ferguson, 54 Ind. 549, 553.

[9] 1892, Palmer v. Union Bank, 17 R. I. 627, 631, 632, 24 Atl. 109.

[10] 1912, Ackerman v. Fichter, 179 Ind. 392, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117.

[11] 1854, First Congregational Society v. Atwater, 23 Conn. 34.

[12] 1893, Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 565, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

[13] 1902, Coleman v. O'Leary, 114 Ky. 388, 406, 24 Ky. Law Rep. 1248, 70 S. W. 1068.

[14] 1912, Busbee v. Thomas, 175 Ala. 423, 432, 57 So. 587.

[15] 1905, Thompson v. Hale, 123 Ga. 305, 309, 51 S. E. 383.

[16] 1847, Brown v. Hummel, 6 Pa. (6 Barr) 86, 47 Am. Dec. 431.

[17] 1885, Pierce v. Weaver, 65 Tex. 44, 47.

[18] 1905, Thompson v. Hale, supra.

[19] 1909, Mason v. Bloomington Library Ass'n, 237 Ill. 442, 450, 86 N. E. 1044 (Reversing 143 Ill. App. 39),

point trustees only "when a power to create them in some other way has not been provided,"[20] exceptional circumstances arise which call the power into existence despite the provisions which the testator may have made. Thus trustees have been appointed of a $400,000 Mormon fund at the time when the Mormon church, on account of its doctrine of plural marriage, was in difficulty.[21] Where the power to appoint has not been exercised in the manner directed by the testator,[22] or the election of trustees as provided by him is impracticable,[1] they will execute the trust **cy pres** by appointing trustees themselves. Under ordinary circumstances, however, they will scrupulously see to it that the directions of the testator are followed, and that his scheme is not altered even as to the agents who are to administer it. Under a direction that a charity is to be administered by persons appointed by the town, beneficiary persons appointed by certain officers of the town will not be allowed to take.[2] The corporate donee of a charitable fund cannot assign it to the state where no such power is conferred by the trust agreement.[3] In any case of an appointment of successors by existing trustees, the validity of such a move is subject to the final action of the courts.[4]

§ 464. **Appointment by Reference to Office, Position, etc.** Testators not infrequently designate certain officers of corporations by their official title as "trustees," and thus leave it somewhat doubtful whether they intend to make the corporations or the individuals the trustees of their charity. No difficulty will be encountered where the corporations themselves are capable of acting as trustees. It has, therefore, been held that a fund, held by a county treasurer under a will to "the poor of Madison County," appertains to the office of the county treasurer so as to make his sureties amen-

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[20] 1885, Pierce v. Weaver, 65 Tex. 44, 48.

[21] 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 349, 31 Pac. 436, 446.

[22] 1900, John v. Smith, 102 Fed. 218, 42 C. C. A. 275.

[1] 1867, Heuser v. Harris, 42 Ill. 425, 435. But see as to application of **cy pres** power 1913, Dykeman v. Jenkines, 179 Ind. 549, 562, 101 N. E. 1013, Ann. Cas. 1915 D. 1011.

[2] 1876, Fellows v. Miner, 119 Mass. 541.

[3] 1920, Bancroft v. Maine Sanitarium Ass'n, 119 Me. 56, 109 Atl. 585, 592.

[4] 1907, Selleck v. Thompson, 28 R. I. 350, 355, 67 Atl. 425.

able to a faithful accounting.[5] A bequest "to the trustees of the Jefferson Academy and their successors in office" is a gift to the institution.[6] A gift to the "church council" of an incorporated church has been held to be a gift to the church itself.[7] Where, however, such officers are incapable of taking the gift in their official capacity, it will be construed to be to them personally in trust.[8] Individual trustees of a charity may, therefore, be selected by their official title.[9] The will of no less a person than Benjamin Franklin made the ministers of the three leading churches of Boston and the selectmen of the town of Boston the trustees of the charity established by himself and has been upheld by the courts.[10] The rector and parish councilors,[11] or other designated officer of a church,[12] the bishop of a diocese,[13] the master of a lodge,[14] the chief officer of a city,[15] is mayor and the president of two designated medical institutions,[16] have, therefore, been held to be capable of taking a trust as individuals, though they were described only by their official titles. The two largest taxpayers of a school district have been appointed as trustees.[17] The appointment of a board may also be confided to the elders of a certain church, the mayor of a city, and the governor of a state.[18]

§ 465. **Duties, Powers, Liabilities.** The duties, powers and liabilities of trustees of charitable trusts do not differ essentially from those attaching to trustees of private trusts.

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[5] 1878, Prickett v. People, 88 Ill. 115.

[6] 1912, Martin Institute v. Maddox, 139 Ga. 491, 77 N. E. 629.

[7] 1919, Board of Foreign Missions v. Shoemaker, 133 Md. 594, 105 Atl. 748. See 1918, Mary S. Fithian Night School v. College, Board of Presbyterian Church, 88 N. J. Eq. 468, 102 Atl. 855, 858.

[8] 1893, Conklin v. Davis, 63 Conn. 377, 384, 28 Atl. 537.

[9] 1900, In re Sturgis, 164 N. Y. 485, 56 N. E. 646.

[10] 1903, Boston v. Doyle, 184 Mass. 373, 68 N. E. 851.

[11] 1912, Ackerman v. Fichter, 179 Ind. 392, 398, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117.

[12] 1913, In re Douglas (Royer v. Potter), 94 Neb. 280, 286, 143 N. W. 299, Ann. Cas. 1914D. 447.

[13] 1888, Mannix v. Purcell, 46 Ohio St. 102, 142, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

[14] 1911, Tate v. Woodyard, 145 Ky. 613, 140 S. W. 1044.

[15] 1898, Kurzman v. Lowy, 52 N. Y. Supp. 83, 85, 23 Misc. Rep. 380.

[16] 1889, Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145.

[17] 1891, Rushmore v. Rushmore, 59 Hun. 615, 12 N. Y. Supp. 776, 35 N. Y. St. Rep. 845.

[18] 1921, Long v. Union Trust Co., 272 Fed. 699 (affirmed 280 Fed. 686). But see 1921, Dirlam v. Morrow, 102 Ohio St. 279, 131 N. E. 365.

They will take the gift subject to such redemption rights against it as may be outstanding,[19] may lease the trust property for long periods,[20] will not be entitled to compensation for services voluntarily rendered,[21] cannot turn over a part of the funds to a use at variance with the trust provisions,[22] cannot receive pay pupils where the charity is confined to orphans and destitute children,[23] cannot remove the seat of the charity to another place to the advantage of themselves and the disadvantage of its beneficiaries,[1] or invest funds donated for a cemetery in a lodge hall,[2] or, though they are a city, invest the trust funds in a memorial building to be owned, controlled and largely occupied by the city[3] without becoming subject to the rule that a trustee, by investing trust funds in his own business, or for his own benefit or accommodation, becomes an insurer of it and its productiveness, and is not entitled to the opinion of the court as to the wisdom or folly of the move. They must account for the property placed under their custody,[4] but will not, where they have mingled trust funds with other funds, be forced to turn the whole conglomerate mass over to the charity where a separation, imperfect and arbitrary though it may be, can be effected.[5] Their status will be similar to that of a board of public officers, or of a committee appointed by a public body, and will enable them to act by majority vote.[6] An individual trustee cannot, therefore, without authority from his colleagues, put an end to a lease,[7] or relinquish the

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[19] 1870, Appeal of Yard, 64 Pa. (14 P. F. Smith) 95, 99.

[20] 1885, Richmond v. Davis, 103 Ind. 449, 453, 3 N. E. 130; 1862, Appeal of Proprietor's School Fund, 2 Walk. 37 (Pa.).

[21] 1907, Henry v. Michigan Sanitarium, 147 Mich. 142, 110 N. W. 523.

[22] 1839, Penfield v. Skinners, 11 Vt. 296.

[23] 1903, Rankine v. De Veaux College, 85 N. Y. Supp. 239, 41 Misc. Rep. 655 (Affirmed 94 App. Div. 611, 88 N. Y. Supp. 1114, affirmed 184 N. Y. 518, 76 N. E. 1106).

[1] 1895, State v. Ausmus, 35 S. W. 1021, 1023 (Tenn.).

[2] 1917, Seitzinger v. Becker, 257, Pa. 264, 101 Atl. 650.

[3] 1892, Bangor v. Beal, 85 Me. 129, 133, 26 Atl. 1112. See 1895, State v. Ausmus, **supra.**

[4] 1834, **Ex parte** Cassel, 3 Watts 408 (Pa.); 1839, Penfield v. Skinner, 11 Vt. 296.

[5] 1866, Attorney General v. Old South Society, 95 Mass. (13 Allen) 474, 492.

[6] 1903, Boston v. Doyle, 184 Mass. 373, 385, 68 N. E. 851.

[7] 1845, Kingsley v. School Directors of Plum Twp., 2 Pa. (2 Barr) 28.

trust property.[8] That they pay out money to persons who are not beneficiaries of the charity, but mere employees of it, is no wrong on their part. Money must be paid to employees in all cases, where the trust is to be performed, in some other manner than by handing out money direct to the beneficiaries. It is the purpose of the expenditure, not the persons who receive it, which is the test which limits their power to disburse.[9]

§ 466. **Bonds.** Whether a trustee of a charitable trust must give bonds for the faithful performance of his duties will depend on the terms of the instrument, the language of the statutes, and the discretion of the courts. No uniformity in the holdings on this subject need, therefore, be expected. While the trustee has been held bound to give a bond under the New Hampshire statute;[10] while a public official who had been made the trustee of a charity has been required in Vermont to give a separate bond to the court in addition to his bond as an officer;[11] while a trustee and executor, charged merely with the distribution of a residue to charities selected by himself, has been held not to be exempted from the duty of giving a bond,[12] it has been held in Massachusetts that the trustees of a public charity are not covered by a statute requiring testamentary trustees to give bonds.[13] The supervision of the courts exercised over a charity has been called a "satisfactory assurance" of their execution by the Rhode Island court.[14]

§ 467. **Who may be Trustee. Judges and Attorney General.** There is no general limitation which prevents corporations, or persons who are under no legal disabilities, from becoming trustees. It certainly "is not necessary that a trustee for charitable purposes should be itself a charitable institution; it is sufficient if the bequest be for charitable

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8 1851, McKissick v. Pickle, 16 Pa. (4 Harris) 140, 149; 1853, Pickle v. McKissick, 21 Pa. (9 Harris) 232, 236.

9 1912, Glover v. Baker, 76 N. H. 393, 418, 83 Atl. 916.

10 1913, Fernald v. First Church of Christ Scientist in Boston, 77 N. H. 108, 88 Atl. 705.

11 1878, Clement v. Hyde, 50 Vt. 716, 722, 28 Am. Rep. 522.

12 1885, White v. Ditson, 140 Mass. 351, 357, 4 N. E. 606, 54 Am. Rep. 473.

13 1865, Drury v. Natick, 92 Mass. (10 Allen) 169, 176; 1839, In re Lowell, 39 Mass. (22 Pick.) 215; 1903, Boston v. Doyle, 184 Mass. 373, 387, 68 N. E. 851.

14 1895, Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

purposes."[15] An executor, a third person, an appointee of the court, or a corporation created after testator's death, may all act as trustees.[16] It goes without saying, however, that no judge, who is or has been called on to pass upon a gift, should be embarrassed by being appointed as a trustee. The attorney generals of the various states are in a somewhat similar situation. Since they are, or may be required to act in the trust matter on behalf of the state, it is improper to appoint them as trustees of charitable trusts.[17]

§ 468. **Incorporation of Trustee.** A charitable bequest to trustees, perpetual in its nature, may be aided and accomplished by an incorporation of the trustees, though the testator has not provided for any such action.[18] Where a charter is procured which neither enlarges nor diminishes the powers of the trustees, nor exempts them from their duties and responsibilities, they form an eleemosynary corporation founded by the testator as a donor.[19] Their mere incorporation does not amount to a diversion of the trust fund,[20] but prevents them from exercising individual acts of ownership over the trust property since the corporation takes their place.[21]

§ 469. **Charitable Corporation as Quasi Trustee.** Charitable corporations are corporations constituted for the perpetual dissemination of the bounty of their founder to the purposes and persons which he may have prescribed,[22] and are the best instruments to administer a charity which reaches far into the future. They may endure forever, have within themselves the power of perpetuation, and, therefore, relieve the courts from the necessity of appointing trustees, and lighten their burdens in other respects. All

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[15] 1900, In re Willey, 128 Cal. 1, 12, 60 Pac. 471.

[16] 1893, Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 565, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

[17] 1910, Manley v. Fiske, 124 N. Y. Supp. 149, 139 App. Div. 665 (Affirmed 201 N. Y. 546, 95 N. E. 1133).

[18] 1836, Sanderson v. White, 35 Mass. (18 Pick.) 328, 29 Am. Dec. 591.

[19] 1848, Nelson v. Cushing, 56 Mass. (2 Cush.) 519, 529.

[20] 1904, Bellows Free Academy v. Sowles, 76 Vt. 412, 419, 57 Atl. 996.

[21] 1915, Howell v. New Hope Benevolent Society, 143 Ga. 38, 84 S. E. 117.

[22] 1815, Phillips Academy v. King, 12 Mass. 546, 557. Followed 1822, American Asylum v. Phoenix Bank, 4 Conn. 172, 177, 10 Am. Dec. 112.

that courts will have to do will be to give the fund to the charitable institution, which is merely a ministerial or prerogative act, while, in the case of individual trustees, they must supervise and see that no breach of trust is committed.[1] A corporation may even take, though it was incorporated during the Civil War, in a state which was then in rebellion,[2] or though it has discontinued a part of its charitable work.[3] That difficulty may attend the ascertainment of the beneficiaries does not affect an effectively created charitable trust.[4] Gifts left to such corporations will be free from many objections which are ordinarily raised against charitable gifts to individual trustees. Therefore, the New York court of appeals has declared that a system, which limits gifts for charitable purposes to corporations, is symmetrical, harmonious, complete and adapted to our political conditions; needs no aid from the royal prerogative, the statute books of England, the unreported jurisprudence of the middle ages, the loose and vague uncertainty of the dangerous doctrine of **cy pres**; does not require the interpolation of unwritten exceptions into the comprehensive language of general laws; is in unison with statutes limiting uses and trusts and forbidding accumulations and perpetuities; is in harmony with other political institutions and antecedent legislation; and is conducive to the attainment of the noble objects which charity is designed to promote, and tends to keep safe and inviolate the funds dedicated to the amelioration of the condition of the race.[5] A gift to such a corporation, therefore, is valid, though it may at some time cease to exist.[6] The same holds good as to a quasi corporation.[7] A corporation where it receives property for its own purposes, however, does not hold such property upon a true

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1 1893, Johnson v. Johnson, 92 Tenn. (8 Pickle) 559, 565, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

2 1872, Frierson v. General Assembly Presbyterian Church, 54 Tenn. 683.

3 1881, Soldiers Orphan Home v. Wolf, 10 Mo. App. 596.

4 1923, Henderson v. Henderson, —— Ala. ——, 97 So. 353.

5 1866, Bascom v. Albertson, 34 N. Y. 584, 613.

6 1919, Skinner v. Northern Trust Co., 288 Ill. 229, 123 N. E. 289.

7 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

technical trust, but only on a quasi trust,[8] which has even been declared to be an absolute gift,[9] or a mere limitation on the use to which the property may be devoted.[10] A gift to it generally, does not prevent another gift by the same testator to one of its special purposes from being effective.[11]

§ 470. **Charitable Corporation as Trustee.** Certainly, trustees need not be natural persons, but may be corporations authorized to serve in such fiduciary capacity.[12] "In case of a charitable trust, whether administered by natural persons or a corporation, all entrusted with the administration are trustees."[13] There is only one limitation on a corporation brought about by its artificial nature and restricted powers as compared with the natural status and unrestricted capacities of natural persons. The trust must not be repugnant to or inconsistent with its proper purposes. A corporation established "for the instruction of youth" cannot take in trust a bequest for the support of missionaries.[14] However, an incorporated church may be the trustee of a charitable trust for its poor and for the education of theological students.[15] Similarly, a lodge may be competent to hold and administer a charitable trust,[16] and one corporation may be the trustee of another to aid it in carrying out its chartered benevolent aims.[17]

§ 471. **Municipality as Trustee.** A city may accept a charitable trust, and by doing so assumes the same obligations and becomes amenable to the same regulations as apply to other trustees, and must execute the trust in accordance with the expressed wishes of the donor.[18] Where it receives

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[8] 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 517, 67 C. C. A. 393 (Affirming 126 Fed. 796); 1921, Sherman v. Richmond Hose Co., 230 N. Y. 462, 130 N. E. 613, 614.

[9] 1920, In re Dol, 182 Cal. 159, 187 Pac. 428.

[10] 1920, Schnack v. Larned, 106 Kans. 177, 186 Pac. 1012.

[11] 1916, Eccles v. Rhode Island Trust Co., 90 Conn. 592, 98 Atl. 129, 132.

[12] 1922, National Finance Corporation v. Robinson, 193 Ky. 649, 237 S. W. 418, 422.

[13] 1877, In re Taylor Orphan Asylum, 36 Wis. 534, 548.

[14] 1844, South Newmarket Methodist Seminary v. Peasley, 15 N. H. 317, 332.

[15] 1827, Witman v. Lex, 17 Serg. and R. 88, 17 Am. Dec. 644 (Pa.).

[16] 1901, Mason v. Perry, 22 R. I. 475, 489, 48 Atl. 671.

[17] 1888, Sheldon v. Chappell, 47 Hun. 59, 13 N. Y. St. Rep. 35; 1899, Cheatham v. Nashville Trust Co., 57 S. W. 202, 204 (Tenn.).

[18] 1922, McKevitt v. Sacramento, 55 Cal. App. 117, 203 Pac. 132.

the trust fund and applies it to its general purposes, it must make restitution.[19]

§ 472. **Charitable Corporation. Private Nature.** Charitable corporations may well be called "public" corporations, in the popular sense of the term. But, in the strict legal sense, a far more limited and exact meaning is given to the term "public."[20] The fact that charities are public is, therefore, no proof that the corporations which administer them are public.[21] Though the uses which they administer, and the benefits which they bestow, are public, their organization and management are private.[22] An argument, which assumes that because the charity administered by a corporation is public the corporation itself is public, confounds the popular with the legal signification.[23] A charitable corporation chartered by the state is, therefore, not a public corporation subject to be dissolved by the legislature at will,[1] or capable of exercising the power of eminent domain,[2] and under the control of the legislature like cities, towns, and villages,[3] but is a private corporation,[4] though its funds have been derived from the bounty of the government.[5] It follows that land devoted to a charitable use may be taken by eminent domain by a railroad.[6]

§ 473. **Absolute Gift to Charitable Corporation. Construction.** Whether outright gifts to charitable corporations are called absolute,[7] or charitable, there can be no question

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19 1923, Attorney General v. Lowell, —— Mass. ——, 141 N. E. 45, 48.

20 1833, Allen v. McKean, Fed. Cas. No. 229, page 496, 1 Summ. 276.

21 1901, Koblitz v. Western Reserve University, 21 Ohio Cir. Ct. Rep. 144, 148, 11 Ohio C. Dec. 515.

22 1876, Humphries v. Little Sisters of the Poor, 29 Ohio St. 201, 206.

23 1819, Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518, 671, 4 L. Ed. 629.

1 1855, Louisville v. University of Louisville, 54 Ky. (15 B. Mon.) 642, 670.

2 1913, Connecticut College for Women v. Calvert, 87 Conn. 421, 435, 88 Atl. 633.

3 1819, Dartmouth College v. Woodward, supra.

4 1823, Society for Propagation of the Gospel v. New Haven, 21 U. S. (8 Wheat.) 464, 480, 5 L. Ed. 662; 1886, Boyd v. Insurance Patrol of Philadelphia, 113 Pa. 269, 280, 6 Atl. 536.

5 1833, Allen v. McKean, Fed. Cas. No. 229, page 497, 1 Summ. 276.

6 1898, Rolfe and Rumford Asylum v. Lefebre, 69 N. H. 238, 45 Atl. 1087.

7 1859, Brendle v. German Reformed Congregation, 33 Pa. (9 Casey) 415. See 1903, Danford v. Oshkosh, 119 Wis. 262, 97 N. W. 258.

but that such gifts are one of the most effective means of accomplishing a charitable purpose. The purposes of the donor of such a gift need not be set out, but will be implied from the purposes of the corporation which are contained in its charter and articles.[8] A gift to such a corporation will be held under its charter and articles, due regard being paid to the directions of the donor.[9] The object for which the donee is incorporated will always be an important element in the construction of the instrument by which a charity is created.[10] A gift of real or personal property generally, without stating the purpose, to a corporation existing for a particular purpose, is a gift for such purpose.[11] While an absolute gift to a natural person who is an ecclesiastic does not create a charity, such a gift to a religious association, whose only purposes are charitable, necessarily creates a charitable trust.[12] A bequest to be applied to a charitable institution is equivalent to a bequest that it be enjoyed by the classes of persons benefited by such institution.[13] In a donation to a church corporation, the beneficiaries are the indefinite persons composing the congregation.[14]

§ 474. **What is a Charitable Corporation?** It will not always be easy to say whether a certain corporation is a charitable one. "Neither the constitution nor the statutes have undertaken to give a definition of a charitable institution or corporation."[15] The definition of such a body will, therefore, be a task imposed upon the courts. A religious corporation has been held not to be a charitable corporation within the meaning of a perpetuity statute.[16] However that may be, it may be stated, without fear of successful contradiction, that a charitable corporation for the financial

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[8] 1905, Carson v. Carson, 115 Tenn. 37, 88 S. W. 175, 178.

[9] 1905, Carson v. Carson, supra.

[10] 1896, Mills v. Davison, 54 N. J. Eq. 659, 666, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594.

[11] 1913, In re Douglas (Royer v. Potter), 94 Neb. 280, 285, 143 N. W. 299, Ann. Cas. 1914 D. 447.

[12] 1860, Appeal of Evangelical Ass'n, 35 Pa. (11 Casey) 316, 321, 322.

[13] 1875, Doughten v. Vandever, 5 Del. Ch. 51, 77; 1870, Appeal of Yard, 64 Pa. (14 P. F. Smith) 95, 100.

[14] 1915, Succession of Percival, 137 La. 203, 207, 68 So. 409.

[15] 1900, People v. New York Society for Prevention of Cruelty to Children, 161 N. Y. 233, 249, 55 N. E. 1063.

[16] 1884, De Wolf v. Lawson, 61 Wis. 469, 480, 21 N. W. 615, 50 Am. Rep. 148.

benefit of its members is a contradiction in terms. "The very idea of individual profit to be made for the parties who invest their money, is antagonistic to that of a charity."[17] The distinctive features of a charitable corporation is that it has no capital stock and no provisions for dividends or profits, and that it derives its funds mainly from public and private charity and holds them for its charitable objects.[18] The absence of capital stock clearly indicates the charitable nature of the corporation.[19] This, however, does not mean that the existence of certificates of membership called "stock" will necessarily make a corporation non-charitable.[20] The mere fact that "stock" is issued to the members of an association does not of itself destroy its charitable character where such certificates are merely receipts which enable the holder to vote.[1] Whether a corporation is charitable cannot, therefore, always be determined from its charter alone.[2] Though the original articles of association look toward profit, and treat the subscribers as stockholders, the school itself is a charity where such articles have been disregarded, and a charter of incorporation has been procured which eliminates all ideas of profit.[3] Where, on the other hand, the notion of profit for its members is retained, the corporation necessarily loses its character as a charity. An academy with stockholders and a charter which provides that the profits of the corporation "shall be divided, in equal portions, to the members of the company" is not a charity.[4]

§ 475. **Gift subject to Annuity.** Charitable corporations not authorized to pay annuities have sometimes been made the beneficiaries of charitable trusts subject to an annuity. The situation in such a case is very simple. The annuitants are tenants for life, while the corporation is the remainder-

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17 1874, State v. Elliston, 63 Tenn. (4 Baxt.) 99, 109.

18 1908, Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 329, 71 Atl. 1032.

19 1895, Hearns v. Waterburry Hospital, 66 Conn. 98, 103, 33 Atl. 595, 31 L. R. A. 224.

20 1894, Durrell v. Belding, 9 Ohio Cir. Ct. Rep. 74, 76, 4 Ohio C. D. 263.

1 1912, In re Centennial and Memorial Ass'n of Valley Forge, 235 Pa. 206, 212, 83 Atl. 683.

2 1886, Boyl v. Insurance Patrol of Philadelphia, 113 Pa. 269, 6 Atl. 536.

3 1895, State v. Asmus, 35 S. W. 1021 (Tenn.).

4 1874, State v. Elliston, 63 Tenn. (4 Baxt.) 99.

man.[5] The testator's intent as to the corporation will not be defeated because a subordinary trust is attached to the gift.[6] "Wherever property is devised or granted to a corporation, partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use, carries with it, as a necessary incident, the power to execute that part of the trust which relates to others."[7] The mere fact that an annuity is attached to a trust will, therefore, not defeat it.

§ 476. **Dissolution of Charitable Corporation. Distribution of Assets.** Since financial profit is not the purpose of a charitable corporation, any attempt by such members to extract a profit for themselves out of the corporation is a wrongful act. "A charity corporation is but a trustee for the public, and to give its assets to its members would be a perversion of the trust."[8] While business corporations may dissolve and distribute their assets among their stockholders, a charitable society holding funds in trust cannot, therefore, on dissolution, appropriate those funds to its members.[9] The forty-nine remaining members of a corporation, which at one time had nearly five thousand members, but which still owns property worth over one hundred thousand dollars, cannot, because they feel the need of a little money, take a "donation" of fifteen hundred dollars each from the corporation "for past services."[10] Even where a charitable corporation is wound up under the insolvency statutes, if a surplus remains after the debts are paid, such surplus must be applied to the charity and cannot be diverted to the members.[11]

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[5] 1891, Booth v. Baptist Church of Christ, 126 N. Y. 215, 246, 28 N. E. 238.

[6] 1878, Currin v. Fanning, 13 Hun. 458, 461, 469 (N. Y.).

[7] 1828, In re Howe, 1 Paige 214 (N. Y.).

[8] 1915, Neptune Fire Engine and Hose Co. v. Mason County, 166 Ky. 1, 5, 178 S. W. 1138.

[9] 1838, Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392; 1844, Thomas v. Ellmaker, 1 Pars. Eq. Cas. 98, 113, 1 Clark 502 (Pa.); 1871, Potts v. Philadelphia Ass'n for Relief of Disabled Firemen, 8 Phila. 326, 3 Leg. Gaz. 398; 1876, Bethlehem v. Perseverence Fire Co., 81 Pa. (31 P. F. Smith) 445, 458; 1879, Appeal of Humane Fire Co., 88 Pa. 389.

[10] 1890, Ashton v. Dashaway Ass'n, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809.

[11] 1913, Bliss v. Linden Cemetery Ass'n, 81 N. J. Eq. 394, 399, 87 Atl. 224.

§ 477. **Municipal Corporation as Trustee.** Public corporations, such as counties, towns, cities and villages may act as trustees. "There is no inherent disqualification or incompetency in a municipal corporation as such to execute and administer a public charitable trust of a character not repugnant to, or inconsistent with, its charter, or general purposes."[12] It is repugnant to all sound ideas of policy and the reason of the law, that municipal corporations should, without a positive prohibition, be incapacitated from receiving legacies for the public purposes of health, education and charity.[13] Municipal corporations are, therefore, authorized to take and hold, unless specially restrained, property, real or personal, in trust for purposes in aid of the objects for which they have been created, or for objects which will promote, aid, or assist in carrying out or perfecting those purposes.[14] That a city may become the trustee of a charity, made to aid some public purpose, charitable in its nature, which it is the duty of the city to support and provide for, cannot admit of a doubt.[15] The appointment of a municipality may even make the gift more definite as it may lead to the inference that it was intended to limit the beneficiaries to the municipal boundaries.[16] Such a trust has been upheld even in Maryland, the court remarking that the power of equity over such trusts does not rest on the statute of Elizabeth.[17] Nor will the fact that certain persons are designated to collaborate with the officials of the city defeat it.[18]

§ 478. **Limitations on Municipal Corporation.** The limitation of this power is practically the same as that which exists in regard to private corporations. Stated negatively, the trust must not be "repugnant to or inconsistent with the proper purposes for which the corporation was created."[19]

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[12] 1911, Roe and Wright v. Seaford, 25 Del. (2 Boyce) 343, 355, 80 Atl. 250.

[13] 1853, State v. McDonogh, 8 La. Ann. 171, 246.

[14] 1914, New Orleans v. Salmen Brick and Lumber Co., 135 La. 828, 834, 66 So. 237; 1920, Treadwell v. Beebe, 107 Kans. 31, 190 Pac. 768.

[15] 1910, Maxcy v. Oshkosh, 144 Wis. 238, 250, 128 N. W. 899, 1138.

[16] 1894, Rush County v. Dinwiddie, 139 Ind. 128, 134, 135, 37 N. E. 795.

[17] 1884, Barnum v. Baltimore, 62 Md. 275, 299, 50 Am. Rep. 219.

[18] 1917, Haggin v. International Trust Co., 69 Colo. 147, 169 Pac. 138, 141.

[19] 1858, Chapin v. School District, 3 Ohio Dec. 321.

Stated affirmatively, it must be within the general scope of its corporate existence,[20] and germane to the purposes for which the municipality exists.[21] While, therefore, municipal corporations cannot take as trustees for merely private purposes,[1] such as private burial grounds,[2] nor for denominational purposes, since church and state are separated,[3] they are most appropriate trustees for public purposes, such as education in all its phases,[4] including libraries,[5] though they are coupled with a business men's club room[6] and homes for the maintenance and education of poor children.[7] The use by municipal corporations of private funds given to aid the poor and needy people within their limits certainly is legal.[8] Gifts to a town for the benefit of its poor,[9] to a parish of the established church in Norway (a municipal corporation),

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[20] 1881, Piper v. Moulton, 72 Me. 155, 159.

[21] 1888, Skinner v. Harrison, 116 Ind. 139, 143, 18 N. E. 529, 2 L. R. A. 137; 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 181, 182; 1899, Handley v. Palmer, 91 Fed. 948, 951 (Affirmed 103 Fed. 39, 43 C. C. A. 100).

[1] 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 181, 182.

[2] 1885, Holifield v. Robinson, 79 Ala. 419.

[3] 1811, Jackson ex dem Lynch v. Hartwell, 8 Johns 422 (N. Y.). But see under the old order 1835, Candia v. French, 8 N. H. 133; 1859, Attorney General v. Dublin, 38 N. H. 459, 577; 1844, Pownall v. Myers, 16 Vt. 408.

[4] 1903, Huntsville v. Smith, 137 Ala. 382, 387, 35 So. 120; 1854, First Congregational Society v. Atwater, 23 Conn. 34, 40; 1888, Skinner v. Harrison, 116 Ind. 139, 143, 18 N. E. 529, 2 L. R. A. 137; 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780; 1914, New Orleans v. Salmen Brick and Lumber Co., 135 La. 828, 66 So. 237; 1897, Brooks v. Belfast, 90 Me. 318, 323, 38 Atl. 222; 1884, Barnum v. Baltimore, 62 Md. 275, 294, 50 Am. Rep. 219; 1847, White v. South Parish in Braintree, 54 Mass. (13 Met.) 506; 1882, Hathaway v. New Baltimore, 48 Mich. 251, 12 N. W. 186; 1857, Chapin v. School District, 35 N. H. 445, 455; 1865, Le Couteulx v. Buffalo, 33 N. Y. 333; 1858, Chapin v. School District, 3 Ohio Dec. 321; 1853, McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 404, 14 L. Ed. 732; 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 507, 16 L. Ed. 701.

[5] 1891, New Haven Young Men's Institute v. New Haven, 60 Conn. 32, 43, 22 Atl. 447; 1865, Drury v. Natick, 92 Mass. (10 Allen) 169, 182; 1905, School Trustees of Hoboken v. Hoboken, 70 N. J. Eq. 630, 634, 62 Atl. 1.

[6] 1897, Beurhaus v. Watertown, 94 Wis. 617, 631, 69 N. W. 986.

[7] 1892, Barkley v. Donnelly, 112 Mo. 561, 575, 19 S. W. 305; 1884, Peynado v. Peynado, 82 Ky. 5, 11, 5 Ky. Law Rep. 753; 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 507, 16 L. Ed. 701.

[8] 1894, Phillips v. Harrow, 93 Iowa 92, 101, 61 N. W. 434.

[9] 1873, Kennedy v. Palmer, 1 Thomp. and C. 581 (N. Y.); 1897, Beurhaus v. Watertown, 94 Wis. 617, 631, 69 N. W. 986. But see 1891, Fosdick v. Hempstead, 125 N. Y. 581, 593, 26 N. E. 801, 11 L. R. A. 715.

for worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge,[10] to a city to furnish relief to all poor emigrants and travelers coming to it on their way **bona fide** to settle in the West,[11] or to endow two poor girls and give pensions to ten old people,[12] or to aid in building and maintaining a foundling hospital[13] have, therefore, been upheld by the courts. What holds good in regard to educational and eleemosynary charities is doubly true where municipal enterprises are contemplated. A city may, therefore, take a charitable gift as trustee and **cestui que trust.**[14] The will of Benjamin Franklin furnishes an example.[15] A town may, therefore, be appointed by a court as the trustee of a public burial ground after the individual trustees are dead.[16] A gift to a city for the purpose of erecting a fountain in one of its parks has been upheld by the California court.[17]

§ 479. **Gift to City need not be to Municipal Purpose.** There is a wide zone between private and municipal purposes. While a gift to a municipality as trustee may not be for a private purpose, it need not be for a municipal purpose, but will be valid if it is for a public purpose. Whether school districts could, without statutory authority, raise money for any library not intended for the purposes of the schools, "is a very different question from whether a district library, if obtained without taxation, would be foreign to the educational interests of the district."[18] A statute prescribing the manner and mode of conducting all the city charities, including hospitals, refers to institutions created by public funds, and does not prevent a private donor from prescribing a different mode of managing a hospital, though

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[10] 1908, **In re** Nilson, 81 Neb. 809, 813, 116 N. W. 971.

[11] 1860, Chambers v. St. Louis, 29 Mo. 543, 577.

[12] 1899, Succession of Meunier, 52 La. Ann. 79, 91, 26 So. 776, 48 L. R. A. 77.

[13] 1894, Phillips v. Harrow, 93 Iowa 92, 101, 61 N. W. 434.

[14] 1917, Haggin v. International Trust Co., 69 Colo. 147, 169 Pac. 138, 141.

[15] See 1903, Boston v. Doyle, 184 Mass. 373, 68 N. E. 851; 1898, Higginson v. Turner, 171 Mass. 586, 591, 51 N. E. 172.

[16] 1910, Seaford v. Wright (Doe v. Roe), 24 Del. (1 Boyce) 216, 75 Atl. 704.

[17] 1914, **In re** Coleman, 167 Cal. 212, 138 Pac. 992.

[18] 1877, Maynard v. Woodard, 36 Mich. 423, 427.

he appoints the city as its trustee.[19] Though cities have no power to use public funds for the benefit of sectarian advancement, they may use money given to them by individuals to promote religion generally without regard to denominational boundaries, by extending a helping hand to all churches without distinction.[20]

§ 480. **Change in Municipal Corporation. Effect.** The fact that municipal corporations are public agencies, subject to change at the will of the legislature, is not affected by any charity that may have been bestowed upon them. A city, by accepting charitable trusts, does not protect itself from any change which the state may see fit to make in its affairs. The management of such trusts may, therefore, be taken away from a city council and placed into the hands of a commission appointed by the courts. The donor will be presumed to have made his gift with a full knowledge that a city is a mere creature of the state, an agent acting under a revokable power.[21] The abolition of or change in any municipal corporation, therefore, does not affect any trust vested in it.[1] An "Orange Humane Society," a public or quasi public corporation, may be dissolved by the legislature and its functions transferred to the Orange County school board.[2] A town may be given the dignity of a city without affecting any charities administered by it.[3] The abolition of school districts, and the substitution in their place of the township school system, does not cancel charitable trusts in favor of such school districts.[4] The destruction of a public school district and the allotment of its territory to four adjoining districts will not destroy the trust, but the proceeds will be distributed among the four districts in proportion to the number of children in each within the territory of

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[19] 1913, Dykeman v. Jenkines, 179 Ind. 549, 560, 101 N. E. 1013, Ann. Cas. 1915 D. 1011.

[20] 1894, Phillips v. Harrow, 93 Iowa 92, 101, 61 N. W. 434.

[21] 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 182.

[1] 1889, Penny v. Croul, 76 Mich. 471, 481, 43 N. W. 649, 5 L. R. A. 858; 1874, Kinnaird v. Miller, 66 Va. (25 Grat.) 107, 116.

[2] 1888, Wambersie v. Orange Humane Society, 84 Va. 446, 5 S. E. 25. But see 1876, Dumfries v. Abercrombie, 46 Md. 172, 179. See Note 16, L. R. A. 695.

[3] 1898, Higginson v. Turner, 171 Mass. 586, 591, 51 N. E. 172; 1865, Meeting Street Baptist Society v. Hail, 8 R. I. 234.

[4] 1895, Sheldon v. Stockbridge, 67 Vt. 299, 304, 31 Atl. 414.

the old district.[5] A different question, of course, is presented where merely certain officers of a town are made the trustees of a charity. It has, therefore, been held in regard to the will of Benjamin Franklin, who had appointed the ministers of the three leading churches of Boston and the selectmen of the town of Boston as the managers of his charity, that the city council of Boston (after it had become a city) did not succeed to the position of such selectmen.[6]

§ 481. **Division of Municipal Corporation. Effect.** A far more difficult question arises where a charity is bestowed upon a political subdivision, such as a township, and such subdivision is thereafter divided into two or more parts. It is common knowledge that a constant change in the boundaries of townships occurs particularly in the newer regions. In such cases, the elementary rule, that the intention of the donor must be carried out, points the way out of the difficulty.[7] To his mind, such township represents a certain area of land rather than a name or the conception of a governmental subdivision. It is referred to, not as the beneficiary of the charity, but as a means of ascertaining such beneficiaries.[8] Its division into two or more parts, with or without adding foreign territory, will, therefore, not affect the charity or its disposition in the least.[9] Whoever the trustee may be, the **cestui que trustent** will be the people included in its former boundaries.[10] A township which is the trustee of a charity may, therefore, remain such, though the land which is the subject of the trust, is actually situated in a new township,[11] or though the very place of testator's birth has been transferred to it.[12] The matter of the trustee is so subsidiary that two towns into which a former town has been divided may well act as such, either jointly or separately. The gift, though made to only one township, may be

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[5] 1921, Chandler v. Persons County, 181 N. C. 444, 107 S. E. 452.

[6] 1903, Boston v. Doyle, 184 Mass. 373, 68 N. E. 851.

[7] 1873, Greenville v. Mason, 53 N. H. 515.

[8] 1875, Fairfield Township v. Ladd, 26 Ohio St. 210, 213.

[9] 1850, Plymouth v. Jackson, 15 Pa. (3 Harris) 44.

[10] 1899, Weston v. Amesbury, 173 Mass. 81, 53 N. E. 147. But see 1873, Greenville v. Mason, 53 N. H. 515.

[11] 1819, Union Baptist Society v. Canthia, 2 N. H. 20.

[12] 1899, Weston v. Amesbury, 173 Mass. 81, 53 N. E. 147.

administered by the two subdivisions into which it has been divided for the benefit of the inhabitants of the township as it was at the time of the testator's death.[13] A donation made for a schoolhouse to the inhabitants of a certain village passes to the school district into which they incorporate, and on the division of such school district, passes to the two parts to be divided among them.[14] Similarly, a devise to the diocese of North Carolina, made in 1881, has, after the diocese had been divided in 1883 into an East Carolina diocese and a diocese retaining the old name, on the death of the testatrix in 1885 inured to both dioceses, though the donor lived in that part which retained the old name.[15]

§ 482. **Growth of Municipal Corporation. Effect.** Municipal corporations are not merely divided, but frequently grow by continually adding territory to themselves. This is the case preëminently in regard to cities. Again the intention of the donor must be resorted to, to solve the questions which arise out of such changes. A city does not mean to him an area of land with certain artificial boundaries which is incapable of any growth, but rather a collection of houses, shops, business blocks and factories connected together by public streets, electric wires, water mains and gas pipes, constituting an organism as much subject to the law of growth and decay as are the bodies of animals and plants and of man himself. In a bequest for the benefit of the poor children of the "town of Zanesville," the word town has, therefore, been construed in its popular sense so as to entitle all poor children residing within any of the present or future additions of the city of Zanesville, on either side of its river, to become beneficiaries, though the village at the time of the testator's death was on only one side of it.[16] The court expressly refused to confine the gift to the narrow limits of the city as it existed at testator's death, but

[13] 1875, Fairfield Township v. Ladd, 26 Ohio St. 210, 213.

[14] 1837, Potter v. Chapin, 6 Paige 639 (N. Y.).

[15] 1889, Diocese of East Carolina v. Diocese of North Carolina, 102 N. C. 442, 9 S. E. 310, 3 L. R. A. 626.

[16] 1867, McIntire v. Zanesville, 17 Ohio St. 352, 362. However, where a testator gives a preference, 1, to orphans born in Philadelphia, 2, to orphans born in other parts of Pesnsylvania, the first preference will be confined to the city limits as they existed at his death. 1859, Soohan v. Philadelphia, 33 Pa. 9, 32, 1 Grant Cas. 494 (Pa.).

extended it to all the territory since incorporated into it. It was not "Zanesville on the east of the Muskingum—not Zanesville on the west—not Zanesville as it was—not Zanesville as it is; but Zanesville as it may be found whenever the grateful duty is to be performed"[17] that was intended by the testator.

§ 483. **State or United States as Trustee.** Whether a state or the United States may be a trustee has not been agitated very much. The Smithsonian Institution at Washington is the gift of an Englishman, James Smithson, to the United States government, which gift has been enforced in England at the suit of the President of the United States.[18] While the power of both the state of Virginia and of the United States to take as a trustee has been denied in New York,[19] while it has been stated that the "weight of authority is against the power of a state, simply because it is a state, to take property for the purposes of a charitable trust,"[20] no valid reason appears to exist why the state should not be able to take such a gift. Such a donation has, therefore, been upheld by the Kentucky supreme court.[1]

§ 484. **Summary. Personal Trustees.** The importance of appointing proper trustees of a charitable trust cannot be overstated. While the validity of a charity may not be affected by the appointment or non-appointment of trustees, its practical operation will almost inevitably be influenced thereby. Great care should, therefore, be exercised to appoint trustees, either by name or by description, or at least to vest the power to appoint them somewhere. While this is true, the greatest care exercised will not suffice to keep cases involving the question out of the courts. Where a corporate trustee is intended, it may be found that it has no existence or no power to take, or is not willing to accept the trust. Where a personal trustee is appointed, such trustee may

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[17] 1851, Zanesville Canal and Mfg. Co. v. Zanesville, 20 Ohio 483, 492.

[18] 1838, President of the United States v. Dummond, 7 H. of L. Cas. 141, 155. See 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 182.

[19] 1865, Levy v. Levy, 33 N. Y. 97, 122, 123, 138. See also 1872, Commonwealth v. Levy, 64 Va. (23 Grat.) 21.

[20] 1907, Catt v. Catt, 103 N. Y. Supp. 740, 743, 118 App. Div. 742.

[1] 1896, Bedford v. Bedford, 99 Ky. 273, 290, 35 S. W. 926, 18 Ky. Law Rep. 193.

refuse, or fail to act, may die, resign, or become incompetent. In all such cases, as well as where no trustee of an otherwise well-defined charity is appointed, the courts will interfere unless indeed the donor has provided machinery for the appointment of successors.

§ 485. **Summary. Corporate Trustees.** A charitable corporation is the most ideal person to act as trustee. It may endure forever; may, where its life is limited, by reincorporation perpetuate itself, helps to define the trust by the provisions of its charter and thus relieves the courts from much unwelcome litigation. The same holds good in regard to municipal corporations. While they may not take gifts for private purposes, they are able to take them for such public purposes as are germane to the purposes of their existence. If they grow, as cities often do, the charity will grow with them, and will not be confined to the boundaries as they existed at the time of the gift. Where they are divided, as is frequently the case with towns, the benefit of the charity will generally be confined to the territory of the town as it existed at the time of the gift, no matter into how many towns the subdivision may have carried parts of such territory. It need hardly be mentioned that the acceptance of a charity will not protect a municipal corporation from any change which the legislature may see fit to make in its affairs. Since private corporations created by the state, and public corporations which are mere agencies of it, may act as trustees, the state itself or the United States may act in this capacity.

CHAPTER XII

MORTMAIN STATUTES

§ 493. **Mortmain and Perpetuity Statutes distinguished.** It has been pointed out that the law of mortmain and the rule against perpetuities are the crucial tests of the charitable nature of testamentary gifts.[1] While this is true, while both have the common object of restraining the locking up of property and preventing its free transmission, they are quite distinct in their origin, nature, and character. Statutes against perpetuities deal with contingent, while statutes against mortmain deal with vested estates. Property in mortmain, therefore, is beyond the law against perpetuity.[2]

§ 494. **English Mortmain Statutes. History.** Gifts in mortmain were so common in Saxon England that the Abbot of St. Albans is said to have told William the Conqueror that the reason why he had subjugated England by the single victory at Hastings was because the land, which was the maintenance of martial men, had been given and converted to pious employments and for the maintenance of holy votaries.[3] Mortmain statutes from the Magna Charta[4] on have therefore, played an important part in the development of the English charity law. One of the serious problems, with which the overlords in England were confronted throughout the middle ages, was the tendency of their tenants to place their land into the dead hand (mortmain) of the church, and thus cut off forever the various perquisites inuring to the lords under the feudal tenures. Accordingly, statutes were enacted from time to time to check this tendency.

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[1] 1886, Holland v. Smyth, 3 How. Prac. (N. S.) 106, 108 (Affirmed 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420).

[2] 1873, Wetmore v. Parker, 52 N. Y. 450, 558 (Affirming 7 Lans. 121).

[3] 1839, Lathrop v. Commercial Bank, 38 Ky. (8 Dana) 114, 122, 33 Am. Dec. 481.

[4] 36th chapter of Magna Charta. See 1839, Lathrop v. Commercial Bank of Scioto, supra. The inhibition in Magna Charta referred only to lands given to religious houses, and so did the statutes which followed it. 1857, Cresson v. Cresson Fed. Cas. No. 3,389, page 807, 6 Am. Law Reg. 42, 5 Pa. Law J. Rep. 431, 5 Clark 431. 1923, State Bank and Trust Co. v. Patridge, —— Ky. ——, 248 S. W. 1056.

These statutes could not but embarrass legitimate charities, even though they were created for other than church purposes. They incidentally gave to trustees of charities an opportunity to misapply the funds placed in their hands for administration. One of the very purposes of the statute of Elizabeth was to clarify the situation and make the existing mortmain statutes clearly inapplicable to the charities enumerated by it. It was enacted "to curb the acquisition of eleemosynary corporations operating under the guise of charities."

§ 495. **English Statutes inapplicable in America.** It will not be necessary to go deeply into the various English mortmain statutes, since they do not have and never did have any application to America. They were passed to cure abuses arising in the process of the decay of feudalism by which feudal tenures, which never had any existence in America, were gradually eliminated from the English law.[5] They were passed at a time when real estate had a peculiar status in the law which it has lost in this day and generation. They were directed against an evil existing in England and were acts of local policy, complicated with local establishments, and having a local operation,[6] and had no possible office to fulfill when America was but a vast wilderness, and have, therefore, not been adopted.[7] They were not intended to extend, and did not extend to the American colonies, being in their causes, provisions, qualifications, and exceptions wholly English, and incapable, without great incongruity, in their effect, of being transferred into the code of any other country.[8] They are, therefore, not in force in America[9] and are inapplicable even to present-day English conditions. "The great and still increasing assimilation of real to personal estate for all the purposes of commerce has, in a great measure, taken away the necessity for such restraints. Land at this day is not what it was in the days of feudalism. It

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[5] 1839, Lathrop v. Commercial Bank, **supra.**

[6] 1848, Beall v. Fox, 4 Ga. 404, 422.

[7] 1879, Dodge v. Williams, 46 Wis. 70, 92, 94, 50 N. W. 1103, 1 N. W. 92.

[8] 1847, State v. Griffith, 2 Del. Ch. 392, 400 (Affirmed 1848, Griffith v. State, 2 Del. Ch. 421, 461).

[9] 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 16 L. Ed. 701.

is no longer clothed with the privileges, nor encumbered with the burdens, of that time, nor is it so far removed from the influence of commerce.''[10]

§ 496. **Classes of Mortmain Statutes.** It does not follow from what has been said that the subject-matter is entirely unregulated in America. The experience of England has too clearly demonstrated that unlimited charitable trusts may become an unmitigated evil, and that no contingent good can compensate for the actual evil attendant upon the withdrawal of property from general use and the placing of it in dead hands.[11] In consequence, mortmain statutes, or statutes analogous to mortmain statutes, have been passed by the various state legislatures. These acts approach the difficulty from two different directions. They either limit the capacity of the donor to give, or the power of the donee to take. They may accordingly be divided into two classes: 1. Those which forbid certain corporations or other persons to take under a will, or to take more than a certain amount of money or value, or more than a certain quantum of land. 2. Those which make void charitable gifts executed within a certain time of testator's death, or prohibit testators, who leave certain relatives, from leaving more than a certain proportion of their property to charity.

§ 497. **Capacity of Donee limited.** The statutes and constitutional provisions, which directly limit the capacity of charitable corporations to take, are not uniform. Some limit the corporation to a certain amount of property arbitrarily fixed and cover both real and personal estate. Others do not attempt to regulate the amount of personal property at all, but confine themselves to real estate which is limited either as to value or quantum. Their purpose is very clearly to prevent lands from being tied up and to leave them free to pass by conveyances as the wants and conveniences of society may demand.[12] No distinction is ordinarily made in these statutes, whether the property is acquired by testamentary dispositions, by gifts **inter vivos**, or by purchase for value. There are important states, however, which

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[10] 1860, Chambers v. St. Louis, 29 Mo. 543, 576.

[11] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 439.

[12] 1885, Germain v. Baltes, 113 Ill. 29; 1899, Chambers v. Higgins, 20 Ky. Law Rep. 1425, 49 S. W. 436.

stringently regulate corporations in regard to their capacity to take under a will, or even absolutely prohibit them so to take. These various classes of restrictions will now be considered.

§ 498. **Foundation purely statutory.** It goes without question that any mortmain policy is purely statutory and that, in the absence of a statutory restriction of some kind, no limitation is imposed on charitable corporations. Unless there is such a restriction, the heirs of a testator will not be heard to question a devise on the ground that the corporation has all the real estate necessary for its corporate ends.[13] The particular statute applicable must, therefore, be resorted to in the settlement of controversies growing out of such gifts.

§ 499. **States without Mortmain Policy.** It will not be profitable to discuss in detail the numerous mortmain provisions in force in the various states. They are found in numerous special charters, general incorporation statutes, constitutional provisions, and even in a statute of wills. They vary with the various conditions with which the different legislatures have been confronted. Some states have even gotten along entirely without them[14] on the theory that when charitable bequests "begin to outrun reasonable provisions for the poor, and seriously impede the alienation of property, it will be time enough for a statute of mortmain."[15] Thus Massachusetts, except for a brief time, has had no mortmain statute, but has been extremely liberal to public charities and to testators, allowing them to give free course to their charitable inclinations up to the last moment of their possession of a sound disposing mind.[16] The statutory limitation of the real estate which a religious corporation can take is, therefore, the nearest approach in Massachusetts to a mortmain act.[17] On the other hand, where a

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[13] 1899, Cheatham v. Nashville Trust Co., 57 S. W. 202, 204 (Tenn.).

[14] 1841, Milne v. Milne, 17 La. 46, 54; 1864, American Bible Society v. Marshall, 15 Ohio St. 537, 544.

[15] 1879, Dodge v. Williams, 46 Wis. 70, 95, 50 N. W. 1103, 1 N. W. 92.

[16] 1907, Hubbard v. Worcester Art Museum, 194 Mass. 280, 282, 80 N. E. 490.

[17] 1912, Chase v. Dickey, 212 Mass. 555, 561, 99 N. E. 410. See 1815, Bartlett v. King, 12 Mass. 536, 7 Am. Dec. 99.

church is absolutely prohibited from taking under a will, any devise to it will be unavailing.[18] Neither can such a prohibition be evaded by making the church a trustee merely for the education of the poor children of its members. "To allow them to do this to sustain a charitable devise, would be to admit them to have a capacity and power which the law creating such corporations declares they shall not possess."[19]

§ 500. **New York Statute of Wills.** One important state deserves particular mention. The original English statute of wills, copied by New York in 1813, was an enabling act which excepted bodies politic and corporate from the benefit of its provisions.[20] Though this statute was construed in 1827 as not permitting an orphan asylum, incorporated with power merely to **purchase** real estate, to take by **devise,** the word "purchase" being construed in its popular rather than in its technical meaning,[1] the question, whether or not this exception was to be considered as a prohibition, was agitated in the state and led the revisers of the New York statutes of 1829 to incorporate in it the following provision: "No devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise,"[2] which provision is still in force.[3] This section was submitted to the legislature by the revisers with a note to the effect that it had been "put in the form of a positive prohibition with the view of calling the attention of the legislature to it, that it may be retained if it is intended to be prohibitory, or may be expunged if deemed unnecessary," and leaves no room for the subtleties and refinements which had obscured the subject.[4] "The necessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms.

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[18] 1878, In re Wright, Myr. Prob. Rep. 213 (Cal.); 1835, State v. Wiltbank, 2 Har. 18 (Del.); 1835, Ferguson v. Hedges, 1 Har. 524 (Del.).

[19] 1835, State v. Wiltbank, 2 Har. 18, 23 (Del.).

[20] Revised Laws of New York of 1813, page 364, paragraph 1.

[1] 1827, McCartee v. Orphan Asylum Society, 9 Cow. 437, 506, 18 Am. Dec. 516 (N. Y.). See 1805, Jackson v. Hammond, 2 Caines Cas. 336 (N. Y.).

[2] Volume two, Revised Statutes of 1829, page 57.

[3] New York Decedents Estates Law, paragraph 12.

[4] 1861, Downing v. Marshall, 23 N. Y. 366, 386, 387, 80 Am. Dec. 290. For dissenting opinion see 23 How. Prac. 4.

The legislative grant of the power is the equivalent to the license from the crown, which, according to an act of Parliament, might dispense with the mortmain statutes in Great Britain."[5] This statute accordingly is a mortmain statute resting on a mortmain policy as distinctly as any act of Parliament,[6] and exhibits the entire mortmain policy of the state.[7] It is very simple indeed, being contained "in each charter creating a charitable corporation. The amount of property which it may take and hold is restricted, but its ownership is absolute, and only qualified by its artificial nature."[8] It is a statute by which "the legislature has effectually guarded against the abuses which have prevailed in other countries, and has rendered it impossible to withdraw, for any length of time, property, either real or personal, to any considerable amount, from circulation and use by the people by putting it into dead hands, or placing it for indefinite accumulation."[9] It extends to corporations organized before its passage,[10] to private[11] and municipal corporations of another state,[12] and to the devise of a mere use as distinct from the legal estate.[13] It covers, however, nothing but devises so that a corporation may freely take gifts of personal property.[14] Since the word "expressly" stands out prominently, such express authority to take must be shown. While a corporation with powers to take by direct purchase or otherwise has been held to be expressly authorized to take by devise,[15] other corporations authorized merely to "purchase, receive and hold,"[16] to "hold, purchase and

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[5] 1861, Downing v. Marshall, supra.

[6] 1866, Bascom v. Albertson, 34 N. Y. 584, 607; 1861, Downing v. Marshall, supra.

[7] 1865, Levy v. Levy, 33 N. Y. 97, 117.

[8] 1873, Wetmore v. Parker, 52 N. Y. 450, 458 (Affirming 7 Lans. 121).

[9] 1873, Holmes v. Mead, 52 N. Y. 332, 339.

[10] 1849, Ayers v. M. E. Church, 5 N. Y. Super Ct. Rep. (3 Sandf.) 351, 359, 8 N. Y. Leg. Obs. 17.

[11] 1879, Draper v. Harvard College, 57 How. Prac. 269, 273 (N. Y.).

[12] 1859, Boyce v. St. Louis, 29 Barb. 650, 18 How. Prac. 125 (N. Y.).

[13] 1861, Downing v. Marshall, 23 How. Prac. 4, 14, dissenting opinion. For main opinion see 23 N. Y. 366, 80 Am. Dec. 290.

[14] 1864, Sherwood v. American Bible Society, 40 N. Y. (1 Keyes) 561, 4 Abb. Dec. 227, 231.

[15] 1861, Downing v. Marshall, 23 N. Y. 366, 388, 80 Am. Dec. 290 (See dissenting opinion 23 How. Prac. 4, 14).

[16] 1859, Boyce v. St. Louis, 29 Barb. 650, 18 How. Prac. 125 (N. Y.).

convey,"[17] to "take, purchase and hold,"[18] to "take, acquire and purchase,"[19] have been denied this right, the word "purchase" being construed in its popular rather than in its legal meaning.

§ 501. **Who can raise the Question?** While it will not be profitable to discuss in detail the individual mortmain statutes directly affecting the donee, there is an important question in connection with them which deserves and has received great attention and research. This question relates to the proper person to raise the question of their breach. Charitable corporations, by unexpected gifts or by a sharp rise in the value of their property, sometimes wake up to the fact that they hold more property or property of greater value than their charter allows. The question, of course, is not presented where more land is devised to such a corporation than it is allowed to hold, but title to the excess has failed.[20] Neither does it arise where the gift is to an unincorporated society,[1] or even to the treasurer of a corporation in trust for it.[2] Nor will it be decided in any case, unless the facts are pleaded and supported by proof.[3] Where a certain value is fixed as a criterion, any incumbrances must, of course, be deducted to arrive at the net value.[4] Given, however, a state of facts where it is unquestioned that there is an excess over and above the statutory limit, whether the excess be one of value or of quantity, the question of the proper person to raise the question remains and has split the courts into two camps.

§ 502. **Gift held void. Consequences.** The question may be stated as follows: Is the gift, so far as it is in excess of such power, absolutely void, or is it voidable only at the option of the state? A number of courts have taken the

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[17] 1861, Downing v. Marshall, supra.

[18] 1834, Theological Seminary of Auburn v. Childs, 4 Paige 419 (N. Y.).

[19] 1805, Jackson v. Hammond, 2 Caines Cas. 336 (N. Y.). This case arose before the statute was enacted but passes on an analogous question.

[20] 1892, Barkley v. Donnelly, 112 Mo. 561, 570, 19 S. W. 305.

[1] 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 175, 26 Am. Dec. 446.

[2] 1871, White v. Howard, 38 Conn. 342, 363.

[3] 1893, Conklin v. Davis, 63 Conn. 377, 382, 28 Atl. 537; 1871, White v. Howard, 38 Conn. 342, 363.

[4] 1872, Wetmore v. Parker, 7 Lans. 121, 127 (Affirmed 52 N. Y. 450).

position that such gift is absolutely void and that the objection to it can be raised by any interested person,[5] though not by a mere stranger.[6] Under such a theory the gift to the corporation, whether it be one of personal[7] or real[8] property, is void and vests immediately in the heirs or next of kin or, in their absence, escheats to the state.[9] Nor will a statute, which permits a charitable corporation to "take and hold," enable it merely to "take" more than it is permitted to take and hold.[10] However, such a gift will not be void in its entirety, where it merely brings the property of the corporation, which before was below the statutory limit, above it.[11] It follows that an attempt by the legislature to enlarge the capacity of such a corporation to take, will be unavailing to affect a gift already executed, since such gift vests in the heirs and cannot be divested by any action taken by the corporation.[12] "The property vested in heirs can no more be taken from them, and bestowed upon others, by legislation, than that of any other class."[13] It has, therefore, been held that a bequest could not vest in the beneficiary corporation beyond the amount to which it was limited at the time of the gift, though the payment of it was directed to be deferred for five years.[14]

§ 503. **Gift held to be only voidable. Consequences.** It is this consequence that has been largely instrumental in inducing the courts to adopt the "better doctrine"[15] accord-

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[5] 1888, In re McGraw, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387 (Affirmed 136 U. S. 152, 34 L. Ed. 427, 10 S. Ct. 775); 1878, Betts v. Betts, 4 Abb. N. C. 317, 397 (N. Y.); 1889, Wood v. Hammond, 16 R. I. 98, 116, 17 Atl. 324, 18 L. R. A. 198.

[6] 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. J. Eq. (2 Stew.) 36).

[7] 1857, Davidson College v. Chambers, 56 N. C. (3 Jones Eq.) 253.

[8] 1882, St. Peter's Roman Catholic Congregation v. Germain, 104 Ill. 440, 446.

[9] 1872, In re Bonard, 16 Abb. Prac. (N. S.) 128, 191 (N. Y.).

[10] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 439. But see 1871, Rainey v. Laing, 53 Barb. 453 (N. Y.).

[11] 1898, Hornberger v. Miller, 50 N. Y. Supp. 1079, 28 App. Div. 199 (Affirmed 163 N. Y. 578, 57 N. E. 1112).

[12] 1894, Coggeshall v. Home for Friendless Children, 18 R. I. 696, 31 Atl. 694.

[13] 1871, White v. Howard, 46 N. Y. 144, 167.

[14] 1843, First Congregational Church v. Henderson, 4 Rob. 209 (La.).

[15] 1889, Penny v. Croul, 76 Mich. 471, 479, 43 N. W. 649, 5 L. R. A. 858.

ing to which only the state can raise the question. According to this theory, the implied limitation of corporations in holding property rests on public policy and is made in favor of the state only, so that gifts in excess of the limitation are not void but voidable only, and cannot be questioned by third persons but only by the state, which may at any time, by legislation or otherwise, completely waive its exclusive right to declare the excess illegal.[16] This doctrine is not only the better in its policy, its reasoning and its analogies, but is also supported by the better authorities[17] and deserves to vanquish the opposing theory.

§ 504. **Donor's Power limited.** The statutes so far considered limit the capacity of donees to take, and are intended to restrict the power of corporations and not the benevolence of individuals. No limit is, therefore, set to the number of such charitable corporations, but only to the undue power of any one of them.[18] Such statutes are mortmain statutes in the true sense of the word. This leaves a second class of statutes which limit the capacity of donors to give rather than that of donees to receive. "To make a valid transfer of property, it is not only necessary that the individual, or corporate body, to whom it is to be transferred, should have the legal capacity to take, but the person who is to make the transfer must also have the right or power to transfer the property, in the manner in which he attempts to transfer the same."[19] These latter statutes are not mortmain statutes in the true sense of the word.[20] They are not passed to protect the state from the dangers incident to excessive financial

[16] 1907, Hubbard v. Worcester Art Museum, 194 Mass. 280, 283, 60 N. E. 490.

[17] 1897, Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339; 1894, Hanson v. Little Sisters of the Poor, 79 Md. 434, 439, 32 Atl. 1052, 32 L. R. A. 293; 1897, In re Stickney, 85 Md. 79, 107, 36 Atl. 654, 60 Am. St. Rep. 308, 35 L. R. A. 693; 1872, Baker v. Clarke Institution, 110 Mass. 88; 1912, Chase v. Dickey, 212 Mass. 555, 560, 99 N. E. 410; 1860, Chambers v. St. Louis, 29 Mo. 543, 577; 1912, Kortright's Estate, 237 Pa. 143, 85 Atl. 111; 1913, Mansfield v. Neff, 43 Utah 258, 275, 134 Pac. 1160; 1848, Miller v. Lerch, Fed. Cas. No. 9,579, 1 Wall. Jr. 210; 1882, Jones v. Habersham, 107 U. S. 174, 188, 27 L. Ed. 401, 2 S. C. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

[18] 1855, Thompson v. Swoope, 24 Pa. (12 Harris) 474, 482.

[19] 1834, Theological Seminary of Auburn v. Childs, 4 Paige 419, 423 (N. Y.).

[20] 1922, In re De Lamar Estate, 197 N. Y. Supp. 301, 203 App. Div. 638 S. C. 198 N. Y. Supp. 909.

power lodged in charitable corporations. They, however, achieve the same purpose to a limited extent and are, therefore, sufficiently analogous to mortmain statutes to be considered in this connection.

§ 505. **Two Classes of Statutes limiting Donor's Power.** These statutes may be divided into two sharply distinguished groups, though both may be contained in one section. The first of these groups makes all testamentary gifts to charity void unless the will is executed a certain time before the testator's death. Its purpose clearly is to secure proper deliberation on the part of testators. The second is contingent on the question whether the testator leaves certain relatives and in such cases only annuls all gifts which exceed a certain amount of his property, no matter how long before the donor's death the will has been executed. Its purpose is to protect the testator's relatives from being deprived of all their expectations in favor of charities.[21] Such expectations are regarded by the law though no next of kin, no matter how near he may be, can be said to have any equitable right in his kinsmen's estate.[1]

§ 506. **Time Limit Statute. Reason and History.** The statutes which make testamentary gifts to charity void if they are executed within a certain period of the testator's death are substantially copies from the famous English mortmain statute of George the Second, passed in 1738.[2] They are not as stringent, however, since they reduce the time within which the will must be executed before the testator's death from one year to at most three months, and allow the testator to dispose of his property by will instead of requiring him to do so by other means. Their object clearly is to prevent deathbed gifts and insure proper deliberation. It is obvious that men, when death approaches, are often beset with difficulties not conducive to the calm balancing of the claims of charity and those of near relatives.[3] Their mental faculties are frequently impaired, their will power broken, and their vital forces weakened. Importunities of designing persons, actuated though they are by unselfish

[21] 1883, Stephenson v. Short, 92 N. Y. 433.

[1] 1867, Heuser v. Harris, 42 Ill. 425, 429.

[2] 9 George 2, Chapter 36.

[3] 1912, In re Ihmes, 154 Iowa 20, 24, 25, 134 N. W. 429.

motives, may under such circumstances easily induce dispositions of property contrary to natural justice and without regard to the ties of kinship.[4] "In the last hours of life, exaggerated impressions of charitable or religious duty often obscure the judgment of men, and subject them to undue influence and persuasion."[5] With the fear of death upon them, men, who have never exhibited a charitable impulse, suddenly awake to the fact that behind them are lost opportunities for usefulness which in some way ought to be made good in order to balance their accounts. Given a person interested in some charity who, with a skill acquired by long experience, begins to play upon their fears and hopes, the just demands of spouse, parents or child sometimes are lost sight of.[6] Deathbed gifts induced by supra mundane hopes or infra mundane terrors, instead of being pious and charitable as they pretend to be, are, therefore, frequently monuments of vanity and impiety, the donor giving to charity that which death is about to wrest from his pallid clutch.

§ 507. **Time Limit Statute. Reason.** A man's fears or superstitions, or his deathbed hope of purchasing a blissful immortality should not be allowed to influence the disposition which he makes of his property to the injury of his heirs.[7] The unfortunate propensity to acquire fame as a religious devotee and benefactor, at the expense of the natural claims of blood and parental duty, requires a check.[8] When a testator leaves the channels through which natural benefactions flow, to extend aid to charity, the law may well require that such intention be manifested by an instrument executed at such a time and in such a manner as to make it reasonably certain that what was done was the free act of the donor and not the result of undue solicitation.[9] It has, therefore, become the public policy of most states "to prohibit a testa-

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[4] 1908, In re Kessler, 221 Pa. 314, 320, 321, 70 Atl. 770, 128 Am. St. Rep. 741. As to what constitutes duress under such circumstances, see 1896, Bowdoin College v. Merritt, 75 Fed. 480. Appeal dismissed 167 U. S. 745, 169 U. S. 551.

[5] 1861, Downing v. Marshall, 23 N. Y. 366, 387, 80 Am. Dec. 290. For dissenting opinion see 23 How. Prac. 4.

[6] 1899, Allen v. Stevens, 161 N. Y. 122, 148, 149, 55 N. E. 568.

[7] 1907, In re Lennon, 152 Cal. 327, 329, 92 Pac. 870, 125 Am. St. Rep. 58.

[8] 1883, Stephenson v. Short, 92 N. Y. 433, 440.

[9] 1908, In re Kessler, 221 Pa. 314, 321, 70 Atl. 770, 128 Am. St. Rep. 741.

tor, unless the act is accompanied with due deliberation, and unless such time is allowed to elapse as gives an opportunity to revoke the same, if hasty or ill considered, from setting aside the claims of those whom he is leaving behind him, and who have a natural right to look to him for some provision for their future life, and the giving of his fortune to religious and charitable corporations."[10] This policy is directed against an abuse which so easily connects itself with charitable motives, and does not compel a testator to give his property to his relatives, nor does it deprive him of the right to give it all to charity during his life.[11] That cases occur where gifts to worthy charitable institutions are defeated because the testator happens to die within the statutory time, though they are not affected by vanity, weakness, improvidence, imposition, mistaken notions of religion, or any of the other evils against which the statute is aimed, is true but cannot change the result. No general law can be framed which will not work hardship in some cases.[12]

§ 508. **Exception of State or Municipality.** A statute, which excepts charitable gifts for the use or benefit of "the state, or any state institution" from the mortmain limitation, does not apply to a municipality. "It can hardly be imagined, if the legislature had intended to include municipalities in this amendment, that it would have failed to say so, by the addition of the simple word 'municipality' which would have fairly obtruded itself upon them in framing this statute."[13]

§ 509. **Codicil within prohibited Period.** Wills have been executed beyond but amended within the statutory period. The validity of the codicil under such circumstances depends upon the facts. A codicil will not be allowed to increase the gift made to a charity under such circumstances. Nor is it necessary that such increase should be the result of direct action. Where the residue of the estate is given to charity by the will, a codicil executed within the statutory time, which reduces the specific bequests and thus increases the

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[10] 1878, Kerr v. Dougherty, 59 How. Prac. 44, 58 (Affirmed 79 N. Y. 327).

[11] 1912, In re Ihmes, 154 Iowa 20, 24, 134 N. W. 429.

[12] 1883, Stephenson v. Short, 92 N. Y. 433, 445.

[13] 1921, In re Honk's Estate, 186 Cal. 643, 200 Pac. 417, 419.

residue, will be ineffective to carry the difference to the charity.[14] Even where a gift to charity is reduced by a codicil, it will be well carefully to guard its language. A codicil in the words, "I also revoke the gift of $1,000 to the Old Men's Home and change it to $500," executed two days before testator's death, has been held to be a revocation rather than a reduction, and hence the charity received nothing.[15] Where, however, the testator has by the codicil merely reduced a gift, it will stand as thus diminished though the codicil was executed within the statutory time.[16] Such a result may be reached by carving annuities out of the gift, thus merely deferring it.[17] A codicil may be valid so far as it cuts down to a life estate an absolute gift, and invalid so far as it gives what is left to charity.[18]

§ 510. **Evasion of Statute. Secret Trust.** It is not surprising that attempts should have been made to evade the statute. Attempts by the beneficiaries have indeed been defeated. It has been held that a charitable society cannot, after the death of a testator, so extend its activities as to comprise non-charitable features and thus obtain a donation which they cannot otherwise take because it is given within the forbidden time.[19] Otherwise, however, these attempts have not been unsuccessful. The process adopted has been to devise or bequeath the property to a trusted individual absolutely, with a request to devote it to the charity which the testator has in mind. Such an arrangement is subject, however, to one stringent and inexorable limitation. There must be no understanding between the testator and the legatee. There must be no secret trust.[20] Such a trust need not necessarily be created by express language, but may spring from the intention of the testator, and from the promise expressed in words, or implied from the silent acquiescence or tacit consent of the legatee.[21] "A court of equity will

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[14] 1914, Lightner's Appeal, 57 Pa. Super. Ct. 469.

[15] 1876, In re Poulson, 11 Phila. 151, 33 Leg. Int. 400.

[16] 1884, Appeal of Carl, 106 Pa. 635.

[17] 1895, Watt's Estate, 168 Pa. 422, 32 Atl. 42, 47 Am. St. Rep. 889.

[18] 1914, In re Anderson, 243 Pa. 34, 89 Atl. 306.

[19] 1919, In re Lawson, 264 Pa. 77, 107 Atl. 376.

[20] See notes in 20 L. R. A. 473, 22 L. R. A. (N. S.) 1262, 13 Ann. Cas. 1196.

[21] 1904, Smith v. Haven's Relief Fund Society, 90 N. Y. Supp. 168, 179, 44 Misc. Rep. 594.

never permit a testamentary scheme, however meritorious in origin or object, to prevail when it is proved that the testatrix and her residuary legatee have entered into an agreement, express or implied, having for its object the evasion of the statute and the subversion of the public policy of the state.''[22] If an absolute estate is devised on a secret trust assented to by the devisee, expressly or impliedly, by knowledge or silence before the death of the testator, equity will fasten a trust on him on the ground of fraud, and the statute will avoid the trust if it is in favor of a charity. Where, however, the devisee has no part in the transaction, and no knowledge of it until after the testator's death, there is no ground upon which such a trust can be fastened upon him, even though he has, after it has come to his notice, expressed an intention to conform to testator's wishes.[1] A gift, however, to the three professional friends of a testatrix—her physician, her attorney, and her clergyman—has been held to be void where a letter of instruction, executed simultaneously with the will, had come to the knowledge of some of them.[2] The conclusion, that there was a secret trust to evade the mortmain statute, has been drawn from the fact that an absolute bequest was made to the attorney of the testatrix who had drawn up the will.[3]

§ 511. **Absolute Gift without secret Trust.** An entirely different question arises where the donee is not advised of the gift until after the donor's death. In such case, there can be no question of a trust and hence no question of a secret trust. The belief of the testator that the donee, a member of a religious order, would deem herself morally bound to apply the gift for the purposes of the order, does not engraft a charitable trust on it.[4] An absolute gift to the pastor of a certain church does not, from the professional character of the recipient, become a charitable trust in the

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[22] 1897, Fairchild v. Edson, 154 N. Y. 199, 222, 768, 48 N. E. 541, 61 Am. St. Rep. 609.

[1] 1876, Schulz's Appeal, 80 Pa. 396, 405.

[2] 1884, O'Hara v. Dudley, 95 N. Y. 403, 14 Abb. N. C. 71, 45 Am. Rep. 53.

[3] 1897, Fairchild v. Edson, supra.

[4] 1886, Lynch v. Loretta, 4 Dem. Sur. 312, 320 (N. Y.).

absence of any knowledge by such recipient.[5] It has, therefore, been held that a bequest to certain charities, "provided, however, in case of my death within thirty days from the date hereof I give, devise, and bequeath all my said residuary estate unto Most Rev. P. J. Ryan, Archbishop of Philadelphia, absolutely," vests in the archbishop on testator's death within such thirty days where he has been ignorant of it before such event.[6] The same rule applies even though a confidence, request, wish, desire, hope, or satisfaction is expressed in connection with such an absolute gift that the donee will devote it to designated charitable purposes.[7]

§ 512. **Inherent Difficulties in Evasion.** This method of evading the statute, however, is inherently unsatisfactory. Human nature is human nature, and the risk of an abuse of the confidence reposed is always present. "The legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him."[8] But, conceding that the personality of the donee is such that this risk is out of the question, he may, in some manner, become aware of the gift before the donor's death, or may die, become insane, or insolvent before he has had an opportunity to carry out his wishes. In the first case a secret trust would arise, while in the others his heirs, guardians, or creditors, as the case might be, would succeed to his rights and might, and probably would, apply the property as permitted by strict law. The expedient adopted to meet this situation, consisting of an appointment of two or more persons as joint tenants, is not very satisfactory. It is much harder to find two or more persons who can be implicitly trusted than it is to find one. In addition, knowledge of the testator's intention is very

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[5] 1893, In re Hodnett, 154 Pa. 485, 26 Atl. 623, 35 Am. St. Rep. 851.

[6] 1908, Flood v. Ryan, 220 Pa. 450, 69 Atl. 908, 22 L. R. A. (N. S.) 1262.

[7] 1914, Estate of Purcell, 47 Cal. Dec. 210 (Cited in 2 Cal. Law Rev. 257); 1891, Matter of Keleman, 126 N. Y. 73, 26 N. E. 968; 1897, Fairchild v. Edson, 154 N. Y. 199, 768, 48 N. E. 541, 61 Am. St. Rep. 609; 1916, Durkee v. Smith, 156 N. Y. Supp. 920, 171 App. Div. 72 (Affirmed 219 N. Y. 604, 114 N. E. 1066).

[8] 1897, Amherst College v. Ritch, 151 N. Y. 282, 323, 45 N. E. 876, 37 L. R. A. 305.

likely to come to some of these donees thus chosen, and will thereupon create a secret trust[9] and thus wreck the whole scheme. On the whole, it will be better and safer, where the death of the donor is likely to occur within the statutory time, to have him execute an absolute deed or assignment of the property to the charity,[10] reserving, where this is desired and is permissible by local law, the right to revoke or change the gift.[11]

§ 513. **Statute limiting Amount that may be given to Charity.** The statutes just considered are enacted to protect testators from hasty action which they would probably repent if they had the opportunity. This purpose is accomplished by making testamentary gifts to charity void unless they are executed a certain time before the donor's death. To a certain extent, such statutes also protect the heirs and next of kin of the testator in their expectations. What is the incidental result of such statutes is the direct aim of another group of enactments, which forbid testators who leave certain relatives (such as spouse, child or parent) from giving more than a certain proportion of their property (generally from one-fourth to one-half) to charity, no matter how long before their death the will is executed. Such statutes apply only where the enumerated relatives are in existence at the time of the donor's death,[12] and have no application where such relatives have died simultaneously with the testator in a common disaster,[13] or where the gift was made contingent on their death, which event has happened.[14] They do not refer to the donor's entire property, but only to his distributable estate left after his debts have

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[9] 1884, O'Hara v. Dudley, 95 N. Y. 403, 14 Abb. N. C. 71, 45 Am. Rep. 53; 1897, Fairchild v. Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609. For an illustration see Section 510 **supra.**

[10] 1882, Appeal of McGlade, 99 Pa. 338. See 1912, **In re** Ihmes, 154 Iowa 20, 24, 134 N. W. 429.

[11] 1896, Bowdoin College v. Merritt, 75 Fed. 480 (Appeal dismissed 167 U. S. 745, 42 L. Ed. 1209, 17 S. C. Rep. 996, 169 U. S. 551, 42 L. Ed. 850, 18 S. Ct. 415).

[12] 1907, St. John v. Andrews Institute, 191 N. Y. 254, 275, 83 N. E. 981 (Affirmed 1909, Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. Ed. 892, 29 S. Ct. 601); 1882, Jones v. Habersham, 107 U. S. 174, 177, 27 L. Ed. 401, 2 S. Ct. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

[13] 1907, St. John v. Andrews Institute, **supra.**

[14] 1871, White v. Howard, 38 Conn. 342, 358.

been paid.[15] They are complied with where the amount given to charity by a will, after excluding that given on a contingency which has not happened, is less than the statutory fraction.[16] They do not limit two charitable beneficiaries each to one-half of the statutory fraction, but allow the one to take more than such half if the other, by reason of its own limitation, is not able to take its full half.[17] They apply, however, to a gift to a wife for life, with remainder to a charity where the wife has used only the interest and has left the principle untouched.[18] In such a case the value of the remainder will not be determined, after the life estate has actually terminated, by the life tables, but by the amounts actually received by the life tenant.[19] Since their object is to protect the natural recipients of the testator's bounty, they have no application where he has merely exercised a power,[20] and are not mortmain statutes in the true sense of the word,[21] operating as they do "upon the testator's capacity to give rather than upon the power of the legatee to take."[22] Though one court has held that this prohibition is absolute and cannot be waived by those benefited by it,[1] the California court has held that a statute which excepts a case where "all of such heirs shall have, by writing, executed at least six months prior to his death, waived the restrictions contained herein," is constitutional, stating that the purpose of the statute is to "safeguard those who might naturally become the objects of a testator's bounty from inadvertence or undue zeal upon his part for a charity"[2] Similarly, the New

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[15] 1881, **In re** Hinckley, 58 Cal. 457, 517; 1912, **In re** Johnson, 137 N. Y. Supp. 166, 76 Misc. Rep. 391.

[16] 1915, Hughes v. Stoutenburgh, 154 N. Y. Supp. 65, 74, 168 App. Div. 512.

[17] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 447.

[18] 1889, McKeown v. Officer, 53 Hun. 634, 6 N. Y. Supp. 201, 25 N. Y. St. Rep. 319, 2 Silvernail 552.

[19] 1912, Frost v. Emanuel, 137 N. Y. Supp. 559, 152 App. Div. 687.

[20] 1907, Farmers Loan and Trust Co. v. Shaw, 107 N. Y. Supp. 337, 56 Misc. Rep. 201 (Affirmed 111 N. Y. Supp. 1118).

[21] 1907, St. John v. Andrews Institute, **supra**; 1866, Harris v. Slaght, 46 Barb. 470, 505 (Modified 2 Abb. Dec. 316, 4 Abb. Prac. (N. S.) 421, 4 Trans. App. 485 (N. Y.).

[22] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 440.

[1] 1867, Harris v. American Bible Society, 2 Abb. Dec. 316, 4 Trans. App. 485, 498, 4 Abb. Prac. (N. S.) 421.

[2] 1923, **In re** Graham's Estate, —— Cal. ——, 218 Pac. 84.

York supreme court has held that a waiver by the heirs is not an assignment, and that the property hence passes direct under the will to the charity and is not subject to a transfer tax.[3] While a gift which exceeds such limit will be void **pro tanto,**[4] the gift itself will not be void in its entirety,[5] but will be reduced to its proper proportion[6] and upheld as thus reduced.

§ 514. **Statutes limiting Amount. Construction.** What charities will come under the bane of the statute will depend upon its language. Whether certain corporations,[7] a college,[8] or a university and orphan asylum[9] are embraced by it; whether an unincorporated church is an "institution" within its meaning;[10] whether trustees of unincorporated societies can take under it,[11] must be left to depend upon the narrower or wider terms used by the legislature. While a gift to the trustees of a charitable corporation has been construed as being made to the corporation within the statute,[12] a bequest made to the treasurer of such a corporation has been upheld.[13] Where the original corporation had no power to take its statutory successor, (another corporation) has been denied this power.[14] In any case, a will is read as if the statutory provision were a part of it.[15]

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[3] 1922, In re De Lamar's Estate, 197 N. Y. Supp. 301, 203 App. Div. 638 S. C. 198 N. Y. Supp. 909.

[4] 1913, University of Georgia v. Denmark, 141 Ga. 390, 402, 81 S. E. 238; 1882, Marx v. McGlynn, 88 N. Y. 357, 376; 1878, Kerr v. Dougherty, 59 How. Prac. 44, 67 (Affirmed 79 N. Y. 327); 1857, Price v. Maxwell, 28 Pa. (4 Casey) 23, 33; 1861, McLean v. Wade, 41 Pa. (5 Wright) 266, 269.

[5] 1863, Paschal v. Acklin, 27 Tex. 173, 196.

[6] 1878, Betts v. Betts, 4 Abb. N. C. 317, 394 (N. Y.); 1912, In re Ihmes, 154 Iowa 20, 23, 134 N. W. 429.

[7] 1884, Hollis v. Drew Theological Seminary, 95 N. Y. 166, 177; 1897, Fairchild v. Edson, 154 N. Y. 199, 768, 48 N. E. 541, 61 Am. St. Rep. 609; 1906, Matter of Cooney, 98 N. Y. Supp. 676, 112 App. Div. 659 (Affirmed 187 N. Y. 546, 80 N. E. 1107).

[8] 1878, Currin v. Fanning, 13 Hun. 458, 472 (N. Y.).

[9] 1904, Colbert v. Speer, 24 App. D. C. 187 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403).

[10] 1883, Byers v. McCartney, 62 Iowa 339, 17 N. W. 571.

[11] 1907, Rine v. Wagner, 135 Iowa 626, 631, 113 N. W. 471; 1913, In re Cleven, 161 Iowa 289, 295, 142 N. W. 986; 1899, Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568.

[12] 1911, In re Clark, 134 N. Y. Supp. 226.

[13] 1909, In re Beaver, 116 N. Y. Supp. 424, 62 Misc. Rep. 155.

[14] 1878, Kerr v. Dougherty, 59 How. Prac. 44 (Affirmed 79 N. Y. 327).

[15] 1905, Robb v. Washington

§ 515. **Donor must be just before he is generous.** Rights of creditors form a limitation on the power of donors which deserves a short mention at this place. The maxim that "a person must be just before he is generous" is not confined to private gifts, but covers charitable gifts as well. "An insolvent debtor can no more give away his property for a charitable use, so as to defraud his creditors, than he can to an individual."[16]

§ 516. **Summary.** While the old English mortmain statutes are inapplicable to American conditions, the American states are not without mortmain restrictions. Not only is the capacity of charitable corporations, limited by true mortmain statutes to certain amounts of property, designated by value or quantity, and limited to real estate or covering personal property as well, but the ability of testators to give is also restricted by acts analogous to true mortmain statutes, and which to a limited extent achieve the same purpose. These latter acts are divided into two distinct groups. Where a testator leaves certain close relatives, their expectations are protected to a certain extent by making all gifts void, so far as they exceed a certain proportion of the donor's distributable estate, no matter how long before testator's death the will was executed. The other group of enactments aims to secure proper deliberation on the part of testators and, therefore, makes all testamentary gifts to charity, executed within a certain time of his death, absolutely void in their entirety, no matter whether the testator leaves any relatives whatsoever. These latter statutes have been evaded by absolute gifts to trusted persons, with a recommendation (not amounting to a trust mandate) to devote them to the charitable objects intended. Such a disposition is valid, provided that there is no understanding whatsoever between the donor and the donee by which a secret trust would be created. It is unsatisfactory, however, since it rests absolutely on the good will of the donee, who may succumb to the temptations offered by it, or may die, or become insane, or insolvent before he has had an opportunity to appropriate the property

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and Jefferson College, 185 N. Y. 485, 78 N. E. 359.

[16] 1893, St. George Church Society v. Branch, 120 Mo. 226, 238, 25 S. W. 218.

to the intended uses. Where, therefore, the donor will probably die within the statutory period, it will be better to have him execute a deed or assignment to the charity, retaining, where this is desired and is permitted by local law, a power to revoke the gift thus made.

CHAPTER XIII

RULE AGAINST PERPETUITIES

§ 527. **Reason. Twofold Meaning.** The free alienability of property is as essential to the healthful condition of the state as is the flowing of the tides to the purity of the sea, or the circulation of the blood to animal life.[1] In recognition of this fact, the rule against perpetuities has been devised to prevent the perpetual entailment of estates, and to give them over to free conveyancing. It is now largely, if not exclusively, statutory, the period during which such entailment is permitted ranging from two or more lives in being to any number of lives in being and those of their immediate descendants. It covers both real and personal property, and may be by executory devise or by way of remainder. It does not depend upon what actually happens, but on what may possibly happen, estimated from the time of the taking effect of a deed or will.[2] One of its meanings is that of an inalienable, indestructible interest. Its other meaning is that of an interest which will not vest until a remote period. It is necessary clearly to keep these two meanings apart or confusion will result. While the latter meaning is the one ordinarily referred to, the former comes to the surface again and again, especially in charity litigation, and occasionally leads to vicious reasoning by both court and counsel.

§ 528. **Rule of Perpetuity. A Test of Charity.** It is not the purpose of this chapter to discuss the rule against perpetuities in all its details. Our attention must be confined to it so far as it relates to charitable trusts. It has been said that one of the crucial tests whether legacies are charitable, is the application to them of the rule against perpetuities.[3] A trust has been said to be charitable because it is a lawful

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[1] 1866, Bascom v. Albertson, 34 N. Y. 584, 605.

[2] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 281.

[3] 1886, Holland v. Smyth, 3 How. Prac. (N. S.) 106, 108 (Affirmed 108 N. Y. 312, 16 N .E. 305, 2 Am. St. Rep. 420).

perpetuity for a public use.[4] Says the Indiana court: "Statutes against perpetuities and remoteness have no application after the corpus of an estate has vested for charity; for the very nature of a charity is a perpetuity."[5]

§ 529. **Inalienable Interest.** It will be well to dispose first of the meaning of the word "perpetuity" by which it denotes an inalienable, indestructible interest. It is true that charitable donations "have been most fruitful devises for locking up property, insomuch that in England, at one period, according to Lord Hardwicke, the clergy and religious houses had contrived to possess themselves of nearly half of the whole real property of the kingdom."[6] As an original proposition, it might indeed be doubted whether a testator should be granted greater power to direct the destination of his money where he gives it to public purposes, than where he creates a merely private trust. He actually has less opportunity of adequately judging the public requirements of the centuries after his death than he has of surmising the needs of his family. It has been stated, therefore, that charitable uses are often indefinite in their nature, unlimited in their amount, locking up forever the property which they embrace, and are otherwise wholly irreconcilable with the general rules by which trusts are governed.[7] It has been pointed out that institutions which are commendable for piety and charity now may be, as they often have been, perverted, and that no man is far-seeing enough to provide for the altered circumstances of institutions, or the class of persons for whose benefit they are originally established. It has, therefore, been argued that landed endowments, even for the best objects, and though supposed to be in the best hands, do not commend themselves to impartial observers by commensurate benefits to the state, their corporators, or the great objects of religion and beneficence which they are created to serve. If permitted, they become

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[4] 1895, Webster v. Wiggin, 19 R. I. 73, 101, 31 Atl. 824, 28 L. R. A. 510. A charity has, therefore, been defined by the Rhode Island court as one "which limits property to any public use to which it is lawful to devote property forever."

[5] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 280.

[6] 1859, Yates v. Yates, 9 Barb. 324, 333 (N. Y.).

[7] 1849, Ayers v. M. E. Church, 5 N. Y. Super. Ct. (3 Sandf.) 351, 371, 8 N. Y. Leg. Obs. 17.

a marked exception to our whole system of laws, regulating the ownership, disposition, and descent of lands, and an exception which is not called for by any necessities of society or of individuals.[8]

§ 530. **Inalienable Interest may be vested in a Charity.** There is some force in this argument. Concrete cases to illustrate it can readily be found in England where no small number of charities have proved to be curses instead of blessings. Not many such cases have arisen in this country where charitable foundations are all of a comparatively recent date.[9] It is not astonishing, therefore, that such reasoning has generally been overruled by the American courts. It is historically clear that a charitable trust does not fall within the scope of the reasoning on which the rule against perpetuities rests.[10] Such rule was devised "to prevent the accumulation of individual wealth, and did not contemplate the possibility of any evil likely to arise from the establishment of a permanent fund for charitable uses."[11] It was contrived to restrain the natural propensity of men to perpetuate their estates in their families and among the descendants of themselves, and their relatives and friends, and therefore, tends strongly to equalize economic and social conditions.[12] Its object, to prevent posthumous accumulations of large fortunes and the pampering of a spurious aristocracy, in truth is promoted by charitable gifts, which diffuse the benefits of an estate in small amounts among the lowly and indigent.[13] The legal restrictions against perpetuities were, therefore, never directed against gifts for charitable uses which, from their very nature, while the good of mankind is to be subserved, are often designed to continue to the end of time and are the better the longer they endure.[14] Being established for objects of public, general and lasting benefit,

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[8] 1857, McCaughal v. Ryan, 27 Barb. 376, 384, 409 (N. Y.). See 1857, Wilson v. Lynt, 30 Barb. 124, 129 (N. Y.).

[9] For a bad example of such misuse see 1834, Ex Parte Cassel, 3 Watts 408 (Pa.). See Section 209, supra.

[10] 1847, State v. Griffith, 2 Del. Ch. 392, 399.

[11] 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 131, 9 Am. Dec. 619.

[12] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 537, 538.

[13] 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 57 (N. Y.).

[14] 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 54 (N. Y.).

they are allowed by the law to be as permanent as any human institution can be.[15] They are exceptions to the general rule which forbids donations of property in perpetuity.[16] The public is not only interested in the rule against perpetuities, but also in the maintenance of public charities which are sustained for equally persuasive reasons of public policy.[17] In addition, charities are guarded from abuse by being placed under the special control and direction of equity.[18] It follows that a charitable use may continue for an indefinite time;[19] may actually "contemplate a perpetuity";[20] may make the property to which it relates practically inalienable;[21] may forever retire property from the uses of commerce;[22] may run "without limitation as to time parallel to, and, of course, never conflicting with, the statute against perpetuities";[23] is not subject to the perpetuity rule,[24] and is all the better in that it is perpetual.[25] Many charitable trusts are, in their very nature, perpetuities which are not, however, prohibited.[1] "It would be absurd to say that a bequest for the use of the poor of the town, or for the maintenance of poor ministers of the gospel, should not continue beyond two specified lives in being, because their continuance would be mischievous or hostile to the spirit of our institutions."[2] A direct gift of money,[3] or of bank stock,[4] to a charity to be kept as a perpetual fund, an annuity charged upon land in favor of such a charity,[5] or property

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[15] 1865, Odell v. Odell, 92 Mass. (10 Allen) 1, 6.

[16] 1920, Smith v. Hayward, 115 S. C. 145, 104 S. E. 473, 475.

[17] 1911, French v. Calkins, 252 Ill. 243, 256, 96 N. E. 877.

[18] 1895, Webster v. Wiggin, 19 R. I. 73, 96, 31 Atl. 824, 28 L. R. A. 510.

[19] 1879, Brown v. Brown, 7 Ore. 285, 297; 1897, Hopkins v. Grimshaw, 165 U. S. 342, 352, 41 L. Ed. 739, 17 S. Ct. 401.

[20] 1911, Moseley v. Smiley, 171 Ala. 593, 596, 55 So. 143.

[21] 1913, Seif v. Krebs, 239 Pa. 423, 425, 86 Atl. 872.

[22] 1874, Ould v. Washington Hospital, 1 MacArthur 541, 549, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[23] 1886, Camp v. Crocker, 54 Conn. 21, 24, 5 Atl. 604.

[24] 1922, Clarion v. Central Savings Bank, 71 Colo. 482, 208 Pac. 251.

[25] 1909, Kasey v. Fidelity Trust Co., 131 Ky. 609, 623, 115 S. W. 739.

[1] 1923, Henderson v. Henderson, —— Ala. ——, 97 So. 353.

[2] 1844, Shotwell v. Mott, 2 Sandf. Ch. 46, 56, 57 (N. Y.).

[3] 1902, Farmers and Merchants Bank v. Robinson, 96 Mo. App. 385, 391, 70 S. W. 372.

[4] 1894, Rush County v. Dinwiddie, 139 Ind. 128, 138, 37 N. E. 795.

[5] 1886, Merritt v. Bucknam, 78 Me. 504, 7 Atl. 383.

permanently vested in trustees, the income only to be used for charity,[6] may, therefore, create a valid charitable trust. The charity created by the will of Benjamin Franklin, though expressly directed to be continued for two full centuries, has been upheld in both Pennsylvania and Massachusetts.[7] It follows that a charitable bequest, intended to be expended during the lives of the trustees, does not come into conflict with the rule.[8]

§ 531. **Power to Corporations. Repeal of Statute Pro Tanto.** The situation is very simple so far as charitable corporations are concerned. As such corporations "are intended to exist for an indefinite time, they must be able to take and hold property in perpetuity, or the object of their creation would be totally defeated."[9] Without a question the rule against perpetuities, since it is created by the legislature, may be abolished by it in whole or part.[10] Each act of incorporation empowering a corporation to take, by devise is such a dispensation in favor of such corporation in respect to the perpetuity statute,[11] and repeals such statute **pro tanto.**[12] The corporate body may, therefore, be legally immortal, and contributions to it may be forever withdrawn from circulation.[13] Of course, the fact that its charter expires within a certain time does not debar a corporation from taking a charitable gift.[14]

§ 532. **One Charity limited on another.** It makes no difference that a number of charities are limited one on the

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[6] 1915, Decker v. Vreeland, 156 N. Y. Supp. 442, 170 App. Div. 234.

[7] 1903, Boston v. Doyle, 184 Mass. 373, 86 N. E. 851; 1893, Franklin v. Philadelphia, 2 Pa. Dist. Rep. 435, 13 Pa. Co. Co. Rep. 241; 1827, Whitman v. Lex, 17 Serg. and R. 88, 91, 17 Am. Dec. 644 (Pa.); 1870, Philadelphia v. Fox, 64 Pa. (14 P. F. Smith) 169, 172. See 1887, Storr's Agricultural School v. Whitney, 54 Conn. 342, 348, 8 Atl. 141.

[8] 1898, Garrison v. Little, 75 Ill. App. 402, 417.

[9] 1872, Wetmore v. Parker, 7 Lans. 121, 126 (Affirmed 52 N. Y. 450).

[10] 1892, Moore v. Moore, 50 N. J. Eq. (5 Dick.) 554, 557, 25 Atl. 403.

[11] 1873, Holmes v. Mead, 52 N. Y. 332, 340.

[12] 1878, Lawrence v. Elliott, 2 Redf. Sur. 235, 248 (N. Y.).

[13] 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 534.

[14] 1919, Sisters of Charity v. Emery, 144 La. 614, 81, So. 99.

other, though a change of trustees is involved.[15] Since one charitable use may be perpetual, the gift to two or more in succession is justified. While the property is taken out of commerce, it instantly goes into perpetual charitable servitude.[16] "As the estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good."[17] Therefore, a deed by a church to a religious school, with an option on the part of the church to retake the property if the school shall be unable to fulfill its mission, does not violate the rule, as the property merely passes from one charity to another.[18] While a limitation of a private gift on a charitable trust is void as a perpetuity,[19] a limitation of a charity on another charity is valid and enforcible,[20] provided that no private trust forms a link in the chain. The fact that the time within which a notice to the first donee is to be given is, by implication, left to the discretion of the executor, is immaterial.[21]

§ 533. **Trust must be a charitable one.** The proposition that only charitable trusts are exempted from the rule against perpetuities cannot be over-emphasized. A trust which may,

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[15] 1914, Brooklyn Church Society v. Brooklyn Free Kindergarten Society, 152 N. Y. Supp. 41; 1893, In re Lennig, 154 Pa. 209, 215, 25 Atl. 1049. But see 1920, Herron v. Stanton, —— Ind. App. ——, 128 N. E. 363, 368.

[16] 1887, Storr's Agricultural School v. Whitney, 54 Conn. 342, 345, 8 Atl. 141.

[17] 1882, Jones v. Habersham, 107 U. S. 174, 185, 27 L. Ed. 401, 2 S. C. Rep. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

[18] 1821, Community of Priests of St. Basil v. Byrne, 236 S. W. 1016 (Tex. Civ. App.).

[19] 1892, Palmer v. Union Bank, 17 R. I. 627, 632, 24 Atl. 109. See 1898, Rolfe and Rumford Asylum v. Lefebre, 69 N. H. 238, 243, 45 Atl. 1087.

[20] 1905, Woodruff v. Hundley, 147 Ala. 287, 39 So. 907; 1896, Christ Church v. Trustees of Donations and Bequests, 67 Conn. 554, 565, 566, 35 Atl. 552; 1915, Green v. Old People's Home, 269 Ill. 134, 147, 109 N. E. 701 (Reversing 190 Ill. App. 152); 1923, In re Pott's Will, 199 N. Y. Supp. 880, 205 App. Div. 147; 1895, Webster v. Wiggin, 19 R. I. 73, 93, 31 Atl. 824, 28 L. R. A. 510; 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 519, 67 C. C. A. 393 (Affirming 126 Fed. 796).

[21] 1908, Ege v. Hering, 108 Md. 391, 70 Atl. 221.

by its terms, endure forever for undefined non-charitable purposes is void, and goes to the heirs of its creator.[22] The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, and if the persons to be benefited by such private trust cannot be ascertained within that period, the gift is void, and a trust results in favor of the heirs or distributees.[23]

§ 534. **Charitable Character decisive.** Since the rule against perpetuities, so far as the duration of an estate is concerned, applies only to private and not to charitable uses;[1] since a void perpetuity is an estate so settled for private uses that by the very terms of its creation there is no power of alienation;[2] since a statute against perpetuities will not be construed to cover charitable trusts,[3] it is of the highest importance to ascertain whether a trust is or is not a private one. A provision which, construed as a private trust, is void, may be upheld where it creates a public charity.[4] A trust for accumulation, which would be void in an ordinary case, may be valid where it is for a charitable purpose.[5] While a private trust must not be perpetual, a charitable trust, if designed to be perpetual, is perpetual.[6] A bequest to an art institute to be built in the future is not void as a perpetuity since a charitable trust is created by it.[7] A gift to a charity, not proceeded by a gift to an individual, is valid, though a period greater than prescribed by the rule against perpetuities may elapse before the taker is empowered to receive the gift. The general charitable intent is **immediate** in such a case, though the property is placed into the hands of trustees.[8] A legacy for masses, for the repose of the soul of

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[22] 1865, Saltonstall v. Sanders, 93 Mass. (11 Allen) 446, 453.

[23] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 550.

[1] 1842, State v. Gerard, 37 N. C. (2 Ired. Eq.) 210, 221.

[2] 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 131, 132, 9 Am. Dec. 619.

[3] 1881, In re Hinkley, 58 Cal. 457, 474.

[4] 1827, McGirr v. Aaron, 1 Pen. and W. 49, 51, 21 Am. Dec. 361 (Pa.).

[5] 1884, Appeal of Curran, 4 Pa. Supreme Ct. Rep. (4 Penny) 331 (Affirming 15 Phila. 84).

[6] 1884, Pell v. Mercer, 14 R. I. 412, 435.

[7] 1891, Almy v. Jones, 17 R. I. 265, 267, 21 Atl. 616, 12 L. R. A. 414.

[8] 1923, In re Pott's Will, 199 N. Y. Supp. 880, 205 App. Div. 147.

the donor and certain of his relatives, is valid as a charitable trust of a religious character.[9]

§ 535. **Burial of Testator and Upkeep of Grave.** One of the most frequent provisions to be met with in wills relates to the disposition of testator's body and the upkeep of his burial lot. That objections to such provisions are not more often made is probably due to a delicate regard to the donor's wishes in this one regard.[10] While this question, however, has arisen with comparative infrequency, it has been presented in both England and America sufficiently often to call for treatment. The question of funds created for the care of cemetery lots has been traversed by able judges and the decisions have been collated. They cannot be said to be discordant, though there are a few cases that are somewhat out of line. These, however, are infrequent, and when considered with reference to their peculiar circumstances and the statutes under which they are decided, rather prove the rule as exceptions.[11]

§ 536. **Monument to Testator's Memory.** A testator may provide for the erection of a monument to himself, just as he may provide for his funeral.[12] He is the sole judge as to how much is to be expended on it. That good taste is violated, or that the expenditure is excessive, is immaterial. A testator may, therefore, provide for a monument which consumes the entire residue of his estate,[13] or costs between $40,000 and $50,000,[14] without violating any rule or policy of the law.

§ 537. **Fund for Upkeep of Grave.** An entirely different question is presented, however, where he attempts to set aside a fund in perpetuity for the purpose of keeping his burial plot in repair. Whatever the holding in England may

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[9] 1902, Coleman v. O'Leary, 114 Ky. 388, 403, 24 Ky. Law Rep. 1248, 70 S. W. 1068.

[10] 1889, In re Fisher, 8 N. Y. Supp. 10, 11, 2 Conn. Surr. 75.

[11] 1903, In re Gay, 138 Cal. 552, 555, 71 Pac. 707, 94 Am. St. Rep. 70.

[12] 1905, In re Koppikus, 1 Cal. App. 84, 87, 81 Pac. 732; 1883, Fite v. Beasley, 80 Tenn. (12 Lea) 328.

[13] 1881, Bainbridge Appeal, 97 Pa. 482.

[14] 1883, Detwiller v. Hartman, 37 N. J. Eq. (10 Stew.) 347, 352.

be,[15] in America, such a provision has almost unanimously been held to create an unlawful perpetuity. Until the legislature has placed such object in the category of charitable uses, the courts will not allow a testator to create a permanent fund, the income of which is to be devoted for all time to the care of his place of interment.[16] "The law is well settled in this country that a perpetual trust cannot be created to take care of a private burial lot unless the creation of such trust is authorized by statute."[17] However general and commendable may be the pervading sentiment of reverence for the burial places of the dead, which springs naturally from the Christian belief in the resurrection of the body, and, however desirable it is that the graves of the dead be decently and reverently cared for, a bequest for this purpose is not **ipso facto** a charity[18] for which a perpetuity may be created.[19] It has, therefore, been held that the care, maintenance, improvement and embellishment of burial plots, containing the remains of members of the Beekman family, is not a charitable purpose.[20] It may be admitted that the result of this doctrine is sometimes unfortunate. "Upon the principle that a trust for the maintenance of the donor's own burial lot is not in the nature of a public use or public charity, some courts have permitted avaricious descendants to transmute the graves of their ancestors into cash."[21] Unfortunate or not, the decisions with few exceptions[22] are uniform, and put the matter beyond the possibility

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[15] See 1882, Jones v. Habersham, 107 U. S. 174, 183, 27 L. Ed. 401, 2 S. C. Rep. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

[16] 1903, **In re** Gay, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70; 1923, Todd v. St. Mary's Church, —— R. I. ——, 120 Atl. 577.

[17] 1909, Mason v. Bloomington Library Ass'n, 237 Ill. 442, 446, 86 N. E. 1044 (Reversing 143 Ill. App. 39, 43).

[18] 1904, Phillips v. Heldt, 33 Ind. App. 388, 397, 71 N. E. 520; 1891, Kelly v. Nichols, 17 R. I. 306, 318, 21 Atl. 906, 19 L. R. A. 413; 1920, Smith v. Heyward, 115 S. C. 145, 104 S. E. 473, 475.

[19] 1881, Piper v. Moulton, 72 Me. 155, 161; 1885, Johnson v. Holifield, 79 Ala. 423, 426, 58 Am. Rep. 596.

[20] 1922, **In re** Beekman, 232 N. Y. 365, 134 N. E. 183, 185.

[21] 1910, Chapman v. Newell, 146 Iowa 415, 421, 125 N. W. 324.

[22] 1885, Holifield v. Robinson, 79 Ala. 419; 1914, M. E. Church of Milford v. Williams, 6 Boyce 62, 96 Atl. 795 (Del.); 1869, Swasey v. American Bible Society, 57 Me. 523, 526; 1911, Stewart v. Coshow, 238 Mo. 662, 142 S. W. 283; 1916, Winslow v. Stark, 78 N. H. 135, 97 Atl. 979, 981; 1916, **In re** Lyon, 159 N. Y. Supp. 951, 173 App. Div. 473. See 1891, Kelly v. Nichols, 17 R. I.

of a doubt.[1] A bequest to an individual to keep the donor's grave in a certain cemetery in repair is, therefore, void,[2] and is not even saved by limiting the time to the period "prescribed by the statute governing perpetuities."[3]

§ 538. **Legislative Intervention.** A different situation exists where the legislature has intervened. The law-making branch of the government certainly has the power to repeal perpetuity statutes **pro tanto,** and thus validate trusts which would be void but for such action. "The institution of a perpetual trust of a public nature, by grant of the legislature, though it be not called charitable in the act, is sufficient to make it charitable in the legal sense."[4] This accordingly has been done in quite a number of states, and has resulted in upholding trusts for the perpetual care of cemetery lots,[5] either on the theory that they are charitable, or on the theory that they, while not charitable, are permissible

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306, 318, 21 Atl. 906, 19 L. R. A. 413.

[1] 1905, **In re** Koppicus, 1 Cal. App. 84, 87, 81 Pac. 732; 1900, **In re** Willey, 128 Cal. 1, 10, 60 Pac. 471; 1884, Coit v. Comstock, 51 Conn. 352, 386, 50 Am. Rep. 29; 1909, Mason v. Bloomington Library Ass'n, 237 Ill. 442, 446, 86 N. E. 1044 (Reversing 143 Ill. App. 39); 1911, French v. Calkins, 252 Ill. 243, 252, 96 N. E. 877; 1913, Burke v. Burke, 259 Ill. 262, 269, 102 N. E. 293; 1881, Church Extension M. E. Church v. Smith, 56 Md. 362, 396; 1892, Hardson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561; 1888, Newark v. Stockton, 44 N. J. Eq. (17 Stew.) 179, 181, 182, 14 Atl. 630; 1883, Detwiller v. Hartman, 37 N. J. Eq. (10 Stew.) 347, 354 and note; 1908, Van Syckel v. Johnson, 70 Atl. 657 (N. J.); 1909, Hilliard v. Parker, 76 N. J. Eq. 447, 74 Atl. 447; 1910, Driscoll v. Hewlett, 198 N. Y. 297, 91 N. E. 784; 1907, **In re** Waldron, 109 N. Y. Supp. 681, 57 Misc. Rep. 275; 1883, Fite v. Beasley, 80 Tenn. (12 Lea) 328.

[2] 1901, **In re** Corle, 61 N. J. Eq. 409, 48 Atl. 1027.

[3] 1889, **In re** Fisher, 8 N. Y. Supp. 10, 11, 2 Conn. Sur. 75.

[4] 1895, Webster v. Wiggin, 19 R. I. 73, 99, 31 Atl. 824, 28 L. R. A. 510.

[5] 1889, Bronson v. Strouse, 57 Conn. 147, 149, 17 Atl. 699; 1909, Hewitt v. Wheeler School and Library, 82 Conn. 188, 72 Atl. 935; 1891, Ford v. Ford, 91 Ky. 572, 577, 16 S. W. 451, 13 Ky. Law Rep. 183; 1913, Huston v. Dodge, 111 Me. 246, 252, 253, 88 Atl. 888; 1891, Greene v. Hogan, 153 Mass. 462, 467, 27 N. E. 413; 1895, **In re** Bartlett, 163 Mass. 509, 513, 40 N. E. 899; 1921, McCoy v. Natick, 237 Mass. 99, 129 N. E. 381; 1898, Webster v. Sughrow, 69 N. H. 380, 381, 45 Atl. 139, 48 L. R. A. 100; 1901, Rollins v. Merrill, 70 N. H. 436, 437, 48 Atl. 1088; 1893, Tirney's Estate, 2 Pa. Dist. Rep. 524; 1882, Jones v. Habersham, 107 U. S. 174, 184, 27 L. Ed. 401, 2 S. C. Rep. 336 (affirming Fed. Cas. No. 7,465, 3 Woods 443).

under the statute.[6] The same result has been achieved where the legislature has authorized cemetery associations to take a perpetual trust for the purpose of keeping burial lots perpetually in repair. A corporation under such a statute is capable of taking, though the same trust to an individual would be void.[7] Of course, there must be a corporation in order that a statute may take effect.[8] A gift to some cemetery corporation in trust to keep one's grave in repair is, therefore, the safest means of achieving the purpose. The same holds good of a gift to a town,[9] or to a religious society which is authorized to maintain a cemetery. Says the Connecticut court: "If the sums of money had been bequeathed to the societies without condition and the income thereof applied to the maintenance of the religious services of the societies generally, and one of their duties had been the keeping in good order burial lots or cemeteries, then the bequest would have been given to a charity, and would have been protected by the statute of charitable uses."[10]

§ 539. **Condition for Upkeep of Donor's Grave.** Whether it is possible to so draw wills that such gifts will be upheld where the legislature has not intervened is very questionable. While conditions to keep tombs in repair have been construed as conditions subsequent which do not defeat the charity;[11] while it has been said that "a valid trust to preserve and keep in repair a vault or tomb, or burying ground may arise, when imposed as a condition to a bequest of property to individuals or to a society";[12] while the same purpose has been sought to be achieved by a charge on a fund

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[6] 1900, Morse v. Natick, 176 Mass. 510, 57 N. E. 996; 1910, Driscoll v. Hewlett, 198 N. Y. 297, 91 N. E. 784; 1918, Close Estate, 260 Pa. 269, 103 Atl. 822.

[7] 1892, Moore v. Moore, 50 N. J. Eq. (5 Dick.) 554, 557, 25 Atl. 403.

[8] 1921, Petition of Tuttle, 80 N. H. 36, 112 Atl. 397.

[9] 1920, McNamara v. McNamara, 293 Ill. 54, 127 N. E. 130.

[10] 1884, Coit v. Comstock, 51 Conn. 352, 386, 50 Am. Rep. 29. See 1875, Schmidt v. Hess, 60 Mo. 591, 595.

[11] 1882, Jones v. Habersham, 107 U. S. 174, 183, 27 L. Ed. 401, 2 S. C. Rep. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443); 1881, Piper v. Moulton, 72 Me. 155, 162, 163. See 1921, Giblin v. Giblin, 173 Wis. 632, 182 N. W. 357.

[12] 1885, Johnson v. Holifield, 79 Ala. 423, 424, 58 Am. Rep. 596.

given to a charity,[13] the tendency of the courts is to construe such provisions as precatory,[14] and imposing only an honorary obligation.[15] The Tennessee court has held that a charity is valid, though a provision which the testator had sought to carve out of it, that his grave be perpetually taken care of, was legally, though not morally, void. Says the court: "We feel sure that the graves of the munificent donor, his wife, and child, will not be neglected by the appreciative community for whom he has supplied so liberal a provision for the charge of its poor."[16] However, the New Hampshire court has construed a gift to a town, on condition that it keep testator's grave in good condition, as a trust so far as the fund was necessary for the specific purposes, and as an absolute gift for the general town purposes so far as it was not so necessary.[17]

§ 540. **Gift to Cemetery.** A different question is presented where a testator goes beyond the plot of ground in which he intends to be buried and extends his benefactions to an entire cemetery. In this age, the general public manifests an increasing interest in ornamenting and caring for places set apart for the burial of the dead, and it is a matter of common knowledge that funds are frequently provided to be held in trust for that purpose. Cemeteries, like parks and other places of resort for the general public, are cared for and beautified by trimming the grass and cultivating foliage and flowers.[18] A decent respect for the memory of the dead "is a universal characteristic of civilized society. No depth of misfortune or poverty can deprive one of its members of the right to a grave, and a rule of law which would deny a generous testator the right to establish a trust for such uses, and yet uphold a trust to pave a street, maintain waterworks, improve navigation, build bridges, main-

[13] 1905, Woodruff, v. Hundley, 147 Ala. 287, 293, 39 So. 907; 1911, Buchanan v. Kennard, 234 Mo. 117, 143, 136 S. W. 415.

[14] 1914, Drennan v. Agurs, 98 S. C. 391, 82 S. E. 622.

[15] 1896, Congregational Unitarian Society v. Hale, 51 N. Y. Supp. 704, 708, 709, 29 App. Div. 396, 27 Civ. Proc. Rep. 303. But see 1918, Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490.

[16] 1872, Hornberger v. Hornberger, 59 Tenn. (12 Heisk.) 635, 639, 640.

[17] 1921, Petition of Tuttle, 80 N. H. 36, 114 Atl. 867.

[18] 1909, Mason v. Bloomington Library Ass'n, 143 Ill. App. 39, 43 (Reversed 237 Ill. 442, 86 N. E. 1044).

tain churches and hospitals, would lack the elements of both reason and consistency."[19] Accordingly, gifts for such purposes have been upheld in the states which have adopted the English charity doctrine,[20] and have been held invalid only in states in which such doctrine had been rejected.[21]

§ 541. **That a Charity creates a Perpetuity is immaterial.** It has been seen that the objection that a charity is a perpetuity has been frequently raised. Courts have, therefore, been often called upon to overrule this objection. This they have usually done in a short and sometimes even curt manner. The objection has been branded in a Louisiana case as frivolous.[1] Charitable trusts have been said not to be perpetuities at all,[2] being excepted from the rule against perpetuities,[3] which in consequence does not apply to them,[4]

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[19] 1910, Chapman v. Newell, 146 Iowa 415, 421, 125 N. W. 324.

[20] 1835, Chatham v. Brainerd, 11 Conn. 60, 87; 1911, Tate v. Woodyard, 145 Ky. 613, 615, 140 S. W. 1044; 1910, Lounsberry v. Square Lake Burial Ass'n, 137 Mich. 513, 129 N. W. 36; 1914, Collector of Taxes v. Oldfield, 219 Mass. 374, 106 N. E. 1014; 1913, Bliss v. Linden Cemetery Ass'n, 81 N. J. Eq. 394, 396, 87 Atl. 224; 1908, Corin v. Glenwood Cemetery, 69 Atl. 1083, 1084 (N. J.).

[21] 1876, Knox v. Knox, 9 W. Va. 124, 150; 1883, Brown v. Caldwell, 23 W. Va. 187, 193, 48 Am. Rep. 376; 1891, Read v. Williams, 125 N. Y. 560, 567, 26 N. E. 730, 21 Am. St. Rep. 748.

[1] 1887, Succession of Auch, 39 La. Ann. 1043, 1044, 3 So. 227.

[2] 1885, Johnson v. Holifield, 79 Ala. 423, 424, 58 Am. Rep. 596; 1917, Haggin v. International Trust Co., 169 Pac. 138, 141 (Colo.); 1910, Chapman v. Newell, 146 Iowa 415, 419, 420, 125 N. W. 324; 1914, Wilson v. First National Bank, 164 Iowa 402, 412, 145 N. W. 948, Ann. Cas. 1916 D. 481; 1857, Fink v. Fink, 12 La. Ann. 301, 320; 1903, Hopkins v. Crossley, 132 Mich. 612, 616, 96 N. W. 499; 1911, Stewart v. Coshow, 238 Mo. 662, 674, 142 S. W. 283; 1914, Buell v. Gardner, 144 N. Y. Supp. 945, 948, 83 Misc. Rep. 513; 1909, Hagen v. Sacrison, 19 N. D. 160, 174, 123 N. W. 518, 26 L. R. A. (N. S.) 724; 1918, Lightfoot v. Poindexter, 199 S. W. 1152, 1165 (Tex. Civ. App.); 1877, Ould v. Washington Hospital, 95 U. S. 303, 24 L. Ed. 450 (Affirming 1 MacArthur 541, 29 Am. Rep. 605).

[3] 1848, Griffith v. State, 2 Del. Ch. 421, 460; 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; 1857, Wilson v. Lynt, 30 Barb. 124, 131 (N. Y.); 1853, Williams v. Williams, 8 N. Y. (4 Seld.) 525, 554; 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed.) 305, 355.

[4] 1914, In re Coleman, 167 Cal. 212, 138 Pac. 992; 1886, Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 389, 6 N. E. 183, 56 Am. Rep. 776; 1894, Phillips v. Harrow, 93 Iowa 92, 107, 61 N. W. 434; 1913, In re Cleven, 161 Iowa 289, 294, 295, 142 N. W. 986; 1901, Troutman v. De Boissiere Odd Fellows Orphans' Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.); 1898, Rolfe and Rumford Asylum v. Lefebre, 69 N. H. 238, 241, 45 Atl. 1087; 1896, Mills v. Davison, 54 N. J. Eq. 659, 662, 35 Atl. 1072, 35 L. R. A. 113, 55

to which they are not obnoxious,[5] against which they do not offend,[6] and with which they do not conflict.[7] Charities, though they are perpetual, certainly are not against public policy.[8] "Otherwise it would result that neither churches, schools, societies, or corporations intended for the public good, could be endowed or maintained in usefulness beyond a limited period."[9] Statements such as the above, however, are misleading.[10] The true rule of perpetuities is concerned with the time of vesting, not with the period of continuance, with the beginning, not the ending. The fact that a fund is to remain in the hands of trustees for forty years and then is to be conveyed to the beneficiary, if certain conditions are met, does not defeat it.[11]

§ 542. **Charitable Trusts create permitted Perpetuities.** Most charities being intended to endure for a long time, actually create perpetuities, using the word in the wider sense. In this sense it has been said that charitable trust statutes give perpetuity to such trusts;[12] that a charity in its very nature implies a perpetuity;[13] that the idea of perpetuity is of its very essence;[14] that any trust which the legislature allows to be sustained by a dedication of property in perpetuity is charitable;[15] that a charitable gift on account of its perpetuity does not offend against the perpetuity rule;[16] that the fact that a charity is a perpetuity is no objection,[17] and that charitable trusts do not create forbidden but permitted perpetuities.[18]

Am. St. Rep. 594; 1898, Staines v. Burton, 17 Utah 331, 336, 53 Pac. 1015, 70 Am. St. Rep. 788.

[5] 1899, In re Upham, 127 Cal. 90, 96, 59 Pac. 315.

[6] 1905, Biscoe v. Thweatt, 74 Ark. 545, 548, 86 S. W. 432.

[7] 1896, Spence v. Widney, 46 Pac. 463, 466 (Cal.); 1919, Skinner v. Northern Trust Co., 288 Ill. 229, 123 N. E. 289.

[8] 1884, Andrews v. Andrews, 110 Ill. 223, 232.

[9] 1863, Paschal v. Acklin, 27 Tex. 173, 196.

[10] 1897, Brooks v. Belfast, 90 Me. 318, 324, 38 Atl. 222.

[11] 1920, Bancroft v. Maine Sanitarium Ass'n, 119 Me. 56, 109 Atl. 585, 588.

[12] 1861, Appeal of Treat, 30 Conn. 113, 117.

[13] 1876, Ruth v. Oberbrunner, 40 Wis. 238, 267.

[14] 1912, Strother v. Barrow, 246 Mo. 241, 250, 151 S. W. 960.

[15] 1895, Webster v. Wiggin, 19 R. I. 73, 98, 31 Atl. 824, 28 L. R. A. 510.

[16] 1906, Tincher v. Arnold, 147 Fed. 665, 669, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[17] 1912, Crim v. Williamson, 180 Ala. 179, 181, 60 So. 293; 1834, Gass v. Wilhite, 32 Ky. (2 Dana) 170, 183, 26 Am. Dec. 446; 1909, Hilliard v. Parker, 76 N. J. Eq. 447, 449, 74 Atl. 447; 1877, Mann v. Mullin, 84 Pa. 297, 300; 1870, Appeal of Yard, 64 Pa. (14 P. F.

§ 543. **Possession postponed.** It is clear that the rule against perpetuities does not apply to charitable uses where the title vests immediately in charity.[19] There is, since the power of alienation was introduced, no principle of law which forbids the appropriation of property to charitable uses.[20] A present gift to a charity is never a perpetuity, though it is intended to be inalienable.[1] If it is vested, it is immaterial that possession is postponed under a condition that a certain fund must first be raised by the city beneficiary.[2] The donor may require that the donee raise a certain amount of money before it will be entitled to his donation without endangering the validity of his gift.[3] Such a condition makes the gift a mere offer, which may be accepted by the performance of the condition, and will thus result in a valid acceptance of it.[4] "Where a donation is tendered to a municipality in aid of some municipal purpose for which it is authorized to expend money on condition that the municipality itself make a contribution in aid of the purpose of the donor, it may do so, provided the lawful right existed to make the expenditure had no donation been made."[5] Similarly, a gift to a city

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Smith) 95, 98; 1853, McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 14 L. Ed. 732.

[18] 1881, In re Hinkley, 58 Cal. 457, 472; 1896, People v. Cogswell, 113 Cal. 129, 137, 45 Pac. 270, 35 L. R. A. 269; 1913, Smart v. Durham, 77 N. H. 56, 60, 86 Atl. 821; 1902, State v. Toledo, 23 Ohio Cir. Ct. Rep. 327, 344; 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 210, 79 S. W. 831; 1895, White v. Keller, 68 Fed. 796, 15 C. C. A. 683, 30 U. S. App. 275; 1860, Perin v. Carey, 65 U. S. (24 How.) 465, 507, 16 L. Ed. 701.

[19] 1913, Dykeman v. Jenkines, 179 Ind. 549, 563, 101 N. E. 1013, Ann. Cas. 1915 D. 1011.

[20] 1812, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 128, 9 Am. Dec. 619.

[1] 1897, Ingraham v. Ingraham, 169 Ill. 432, 451, 48 N. E. 561, 49 N. E. 320; 1863, Philadelphia v. Girard, 45 Pa. (9 Wright) 9, 26, 84 Am. Dec. 470. But see 1914, Novack v. Orphans' Home of Baltimore, 123 Md. 161, 90 Atl. 997, Ann. Cas. 1915, C. 1067; 1865, White v. Hale, 42 Tenn. (2 Cold.) 77, 82.

[2] 1894, Phillips v. Harrow, 93 Iowa 92, 107, 61 N. W. 434.

[3] 1912, Franklin v. Hastings, 253 Ill. 46, 51, 97 N. E. 265, Ann. Cas. 1913, A. 135; 1894, Phillips v. Harrow, 93 Iowa 92, 102, 61 N. W. 434; 1909, Hagen v. Sacrison, 19 N. D. 160, 180, 123 N. W. 518, 26 L. R. A. (N. S.) 724; 1906, Tincher v. Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471. But see 1911, Robbins v. Boulder County, 50 Colo. 610, 616, 115 Pac. 526; 1861, Phelps v. Pond, 23 N. Y. 69.

[4] 1910, Francis v. Preachers' Aid Society, 149 Iowa 158, 165, 166, 126 N. W. 1027; 1877, Morville v. American Tract Society, 123 Mass. 129, 25 Am. Rep. 40. See 1916, In re Hartung, 4 Nev. 262, 160 Pac. 782.

[5] 1910, Maxcy v. Oshkosh, 144 Wis. 238, 256, 128 N. W. 899, 1138.

in trust for one of two objects to be selected by the city is not void under the statute against perpetuities as the city must forthwith begin to administer the trust.[6] Of course, authority indefinitely to delay the execution of a charitable trust is equivalent to authority not to execute it at all.[7]

§ 544. **Dispensation of Charity postponed.** The actual dispensation of the charity may be postponed for a time.[8] A charitable gift is a vested interest from the time it takes effect, though the individuals benefited receive no aid from it until they are selected or appointed.[9] Where a gift to charity is **in praesenti** and complete, the fact that the time within which the corporation which is to dispense it is to be organized is not limited, and that it may not come into existence within the time allowed for the vesting of future estates, does not affect the validity of the gift.[10] Its administration begins as soon as the trustees take hold of it, though they do not, on account of lack of funds, at once attempt to carry it out.[11] "The immediate and unconditional devotion of a fund to charity, and not the time or manner of its application or administration, is the test of the validity of its creation."[12]

§ 545. **Liberal Construction.** Nor will courts be dull of vision, when it comes to discovering the necessary intent to make an unconditional and immediate gift. They will, on the contrary, be "keen sighted"[13] to discover such an intention and thus uphold the gift. A donation, which is not to take effect or be executed until the buildings and other improvements on a certain lot are completed and entirely paid

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[6] 1891, New Haven Young Men's Institute v. New Haven, 60 Conn. 32, 42, 22 Atl. 447.

[7] 1917, Egleston v. Trust Co. of Georgia, 147 Ga. 154, 93 S. E. 84, 85.

[8] 1874, Ould v. Washington Hospital, 1 MacArthur 541, 547, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[9] 1847, State v. Griffith, 2 Del. Ch. 392, 409.

[10] 1893, Crerar v. Williams, 145 Ill. 625, 648, 34 N. E. 467, 21 L. R. A. 454 (Affirming 44 Ill. App. 497); 1920, Jansen v. Godair, 292 Ill. 364, 127 N. E. 97, 101.

[11] 1911, Adams v. Page, 76 N. H. 96, 98, 79 Atl. 837.

[12] 1897, Ingraham v. Ingraham, 169 Ill. 432, 452, 48 N. E. 561, 49 N. E. 320; 1895, Webster v. Wiggin, 19 R. I. 73, 96, 31 Atl. 824, 28 L. R. A. 510.

[13] 1897, Ingraham v. Ingraham, 169 Ill. 432, 453, 48 N. E. 561, 49 N. E. 320.

for, is nevertheless a present valid gift vested immediately.[14] This is particularly so where the gift is not in any manner connected with any intermediary estate. The United States Supreme Court, therefore, says that "a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person."[15] This doctrine finds support upon the ground that the intention in favor of the charity is absolute; the gift and the constitution of the trust is immediate, and takes effect **in praesenti.**[16] Similarly, the fact that the donee is limited to using the income does not violate the statute against perpetuities.[17]

§ 546. **Charitable Gifts must vest within statutory Time.** This leaves the question whether the rule applies where such vesting is not immediate but is postponed for a greater or lesser period. The rule against perpetuities refers to the vesting of an estate, and not to its continuance after it has become vested.[18] Says the New York court: "Statutes against perpetuities relate to **expectant** estates and limitations of **future** contingent interests in personal estate, and **future** estates in land."[19] Charities, therefore, form no exception to the law against perpetuities; at least while they remain contingent and executory. Estates, although given to charitable uses, must vest within the time prescribed by law.[20] "If a gift in trust for a charity is conditioned upon a future and uncertain event, the rules applicable to such a

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[14] 1882, Jones v. Habersham, 107 U. S. 174, 177, 27 L. Ed. 401, 2 S. Ct. 336 (Affirming Fed. Cas. No. 7,465, 3 Woods 443).

[15] 1883, Russell v. Allen, 107 U. S. 163, 171, 27 L. Ed. 397, 2 S. Ct. Rep. 327 (Affirming Fed. Cas. No. 12,149, 5 Dill. 235); 1893, Woodruff v. Marsh, 63 Conn. 125, 133, 26 Atl. 846, 38 Am. St. Rep. 346; 1896, In re John, 30 Ore. 494, 513, 47 Pac. 341, 50 Pac. 226, 36 L. R. S. 242.

[16] 1909, Hagen v. Sacrison, 19 N. D. 160, 178, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[17] 1920, Potter v. Pike, 183 N. Y. Supp. 842.

[18] 1894, Phillips v. Harrow, 93 Iowa 92, 106, 61 N. W. 434.

[19] 1872, Wetmore v. Parker, 52 N. Y. 450, 458 (Affirming 7 Lans. 121).

[20] 1863, Rose v. Rose Benevolent Association, 28 N. Y. 184 (cited 34 N. Y. 579).

gift are the same as apply to any other estate, depending for its coming into existence upon a condition precedent. Should the condition never be fulfilled, the estate would never arise, or if so remote and indefinite as to transgress the limits of time prescribed by law against perpetuities, the gift fails.''[21]

§ 547. **Charitable Gifts must vest within statutory Time.** The vesting may be postponed for any period within the limit fixed by the statute. Thus, a gift to a natural person for his life or widowhood,[22] with remainder over to a charity is valid, since the time of vesting is not unduly postponed. It, of course, does not vest until the life estate or widowhood has expired,[1] even though the beneficiaries are ex-Confederate soldiers, who are fast passing away.[2] Such person may be an annuitant,[3] or may not have any estate in the property.[4] All devises or grants, however, whether they are for charitable uses or otherwise, must vest, if they vest at all, within the time limited by the statute.[5] Charitable donations form no exception to the law against perpetuities while they remain contingent and executory.[6] ''A testamentary gift to charitable uses, if open to no other objection, is within the statutes in relation to perpetuities, if it is not to vest at the testator's death, or within a period thereafter bounded by human life.''[7] The reason for this rule has been said to be that if a contingent estate was allowed to vest at a more remote period than that permitted by the statute, it could not, until the happening of the contingency, be ascertained who is entitled to the estate, so that it could not be alienated even if all mankind joined in the conveyance.[8] That the

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[21] 1920, Jansen v. Godair, 292 Ill. 364, 127 N. E. 97, 100.

[22] 1921, Long v. Union Trust Co., 272 Fed. 699.

[1] 1919, Wright v. Wright, 225 N. Y. 329, 122 N. E. 213.

[2] 1921, State v. Bank of Commerce and Trust Co., 143 Tenn. 287, 227 S. W. 1029.

[3] 1911, French v. Calkins, 252 Ill. 243, 255, 96 N. E. 877.

[4] 1871, Burrill v. Boardman, 43 N. Y. 254, 3 Am. Rep. 694. But see 1861, Downing v. Marshall, 23 N. Y. 366, 377, 80 Am. Dec. 290. For dissenting opinion see 23 How. Prac. 4.

[5] 1876, Jocelyn v. Nott, 44 Conn. 55, 59; 1909, Korsstrom v. Barnes, 167 Fed. 216, 222. But see 1884, Andrews v. Andrews, 110 Ill. 223, 230.

[6] 1863, Rose v. Rose, 4 Abb. Ct. of App. Dec. 108, 112 (N. Y.).

[7] 1866, Bascom v. Albertson, 34 N. Y. 584, 598.

[8] 1865, Odell v. Odell, 92 Mass. (10 Allen) 1, 5.

amount involved is very small, is immaterial.[9] A gift to a charity subject to the payment of annuities to seven persons is, therefore, void as a perpetuity. A donor cannot create legal and equitable estates for persons in being or not provided that the ultimate remainder is given to charity.[10] Neither will a gift which creates a perpetuity be upheld, because a portion of the undivided income is given to a charity. It is not in the power of an individual to create a perpetuity by devoting a small portion of his property to charity. A little charity will not preserve the gift in such a case.[11]

§ 543. **Liberal Construction.** Courts incline to a liberal construction in order to uphold charitable donations against the charge that they violate the perpetuity rule. It has been stated that, in respect to gifts to charity, "there is no place in a court of equity for the application of the rule as to perpetuities unless it appears on the face of the will itself that under no circumstances was it the intention of the testator that his bequest should operate until after the expiration of the time prescribed by the rule."[12] A charity, that must go into operation as soon as a person coming within the class benefited comes into being,[13] or as soon as a corporation is organized,[14] or as soon as a chapel is built within such time as may be limited by the probate court,[15] has, therefore, been held not to be illegally postponed. In a gift to a charity on an alternative contingency (the life of a person in being, or the life of that person and any children he may have), the validity of the trust will depend upon the event. If the life tenant dies without children, it is valid. If he dies with children, it is void.[16] "If at the testator's death there only be a possibility of the happening of a contingency by which the gift may be postponed beyond the period prescribed in the rule against perpetuities, but that contingency in fact

[9] 1881, Piper v. Moulton, 72 Me. 155, 159.

[10] 1905, Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359.

[11] 1884, Colt v. Comstock, 51 Conn. 352, 386, 50 Am. Rep. 29.

[12] 1874, Gould v. Washington Hospital, 1 MacArthur 541, 550, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[13] 1888, Appeal of Goodrich, 57 Conn. 275, 284, 18 Atl. 49.

[14] 1884, Colt v. Comstock, 51 Conn. 352, 383, 50 Am. Rep. 29.

[15] 1884, Appeal of Tappan, 52 Conn. 412, 419.

[16] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 573.

has not happened, and from events which have already taken place cannot happen, the gift will be supported."[17]

§ 549. **Charity limited on void private Trust.** A charitable trust is sometimes limited on other trusts which are void as perpetuities. The legal situation in such a case is clear. A trust, valid in itself as a charity, cannot be enforced, but is void where it rests on invalid trusts controlling in their nature, and unascertainable in their scope.[18] A charitable bequest which is a part of a general scheme, and depends upon an invalid trust for thirty years, is itself invalid.[19] So is a charitable gift limited on a donation to a savings bank.[20] An alternative charitable gift, depending upon the same event, not measured by lives on which the first gift depends, is like such first gift void as creating a perpetuity.[21] The invalidity of the first trust will not give any life to the second trust. A charitable trust limited on a non-charitable trust is void as a perpetuity, even though the non-charitable trust itself is void.[1] "If a testator ties up his property for a time, by possibility longer than a life or lives in being and twenty-one years and nine months, and then gives it over to a charity, the gift to charity is void, **because of the perpetuity in the first taker.**"[2]

§ 550. **States which abolish the English Charity Doctrine.** A different situation exists, or existed, in states in which the English charity doctrine is or was not recognized, such as New York before the Tilden act in 1891,[3] Wisconsin[4]

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[17] 1874, Ould v. Washington Hospital, 1 MacArthur 541, 549, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[18] 1891, Kelly v. Nichols, 17 R. I. 306, 323, 21 Atl. 906, 19 L. R. A. 413.

[19] 1904, Phillips v. Heldt, 33 Ind. App. 388, 398, 71 N. E. 520.

[20] 1923, Institution for Savings v. Roxbury Home, 244 Mass. 583, 139 N. E. 301.

[21] 1863, Rose v. Rose, 4 Abb. Court of App. Dec. 108, 114 (N. Y.).

[1] 1849, Hillyard v. Miller, 10 Pa. (10 Barr.) 326; 1863, Philadelphia v. Girard, 45 Pa. (9 Wright) 9, 28, 29, 84 Am. Dec. 470; 1908, Van Syckel v. Johnson, 70 Atl. 657 (N. J.).

[2] 1893, Crerar v. Williams, 145 Ill. 625, 646, 34 N. E. 467, 21 L. R. A. 454 (Affirming 44 Ill. App. 497).

[3] See Chapter 2, Sections 47-56; 1853, King v. Rundle, 15 Barb. 139 (N. Y.); 1858, Leonard v. Burr, 18 N. Y. 96; 1860, Bascom v. Nichols, 1 Redf. Sur. 340 (Affirmed 34 N. Y. 584); 1865, Levy v. Levy, 33 N. Y. 97, 124; 1866, Bascom v. Albertson, 34 N. Y. 584, 595, 596; 1871, Adams v. Perry, 43 N. Y. 487, 499.

[4] 1903, Danforth v. Oshkosh, 119 Wis. 262, 273, 97 N. W. 258.

before the return of that state to the English charity doctrine,[5] and Maryland.[6] Since charity is or was not recognized in these states, except to a very limited extent, the field of perpetuities is or was immensely extended. Gifts to charities, to be organized after testator's death[7] within a period of one year and eleven months,[8] or within five[9] or ten years,[10] or depending upon the raising of a certain other sum for the same purposes within five[11] or two years[12] after testator's death, a direction to invest a gift for two years before turning it over to the beneficiary,[13] a gift to any legally incorporated hospital situated in a certain place within five years from the time of testator's death,[14] or to a "polytechny" in case enough remains of the estate, and the legislature is favorable,[15] have, therefore, been held to be void and of no effect.[16]

§ 551. **Accumulations. Validity.** Closely related to perpetuities are accumulations for charitable purposes. This subject is generally left without legislative regulation, and must, therefore, be disposed of by the courts on general lines of policy. An accumulation for a public charity is not subject to the same rules as an accumulation for private purposes on the one hand, nor should it, on the other hand,

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[5] See Chapter 2, Sections 62 to 65.

[6] 1900, Trinity Methodist Episcopal Church South v. Baker, 91 Md. 539, 573, 46 Atl. 1020; 1900, Missionary Society v. Humphreys, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432; 1917, American Colonization Society v. Soulsby, 129 Md. 605, 99 Atl. 944, 948.

[7] 1891, Booth v. Baptist Church of Christ, 126 N. Y. 215, 236, 237, 28 N. E. 238.

[8] 1911, Washburn v. Acome, 131 N. Y. Supp. 963, 74 Misc. Rep. 301 (Affirmed 136 N. Y. Supp. 1150, 151 App. Div. 948).

[9] 1878, McKeon v. Kearney, 57 How. Prac. 349 (N. Y.).

[10] 1889, Cruikshank v. Home for the Friendless, 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140.

[11] 1863, Rose v. Rose, 4 Abb. Court of App. Dec. 108, 113 (N. Y.).

[12] 1891, Booth v. Baptist Church of Christ, 126 N. Y. 215, 243, 28 N. E. 238.

[13] 1903, Smith v. Chesebrough, 176 N. Y. 317, 68 N. E. 625. But see 1915, Butterworth v. Keeler, 154 N. Y. Supp. 744, 746, 169 App. Div. 136 (Affirmed 219 N. Y. 446, 114 N. E. 803).

[14] 1911, Southhampton Hospital Ass'n v. Fordham, 131 N. Y. Supp. 91, 72 Misc. Rep. 247.

[15] 1850, Yates v. Yates, 9 Barb. 324, 344 (N. Y.).

[16] But see 1871, Burrill v. Boardman, 43 N. Y. 254, 262, 3 Am. Rep. 694.

be treated as valid forever, as in such case it would subserve no practical charitable purpose. It should be allowed or stopped as the exigencies require. It will be prevented from going through the ages and becoming a public menace and thus will be made to subserve its main purpose.[17] The limits of such an accumulation will be subject to the orders of the court, restraining on the one side an unreasonable and unnecessary accumulation, and allowing on the other side a reasonable accumulation to carry out the intentions of the benefactor.[18] The mere fact that an accumulation may outrun the period of time allowed by the statutes against perpetuities is not sufficient to authorize equitable interference.[19] Such accumulation may be entirely reasonable and unobjectionable. "The justice or policy of a rule is not apparent, which would prevent a person charitably disposed, but whose property is not large enough to carry out his charitable intent by an accumulation of twenty-one years, from founding a charity, except through the indirect measure of a life or lives in being; especially when the period of accumulation which he needs or selects is one within the average duration of accumulation under the common law."[20] A charitable gift with a direction to accumulate the same for one life,[21] or for twenty-five years,[22] or for a longer period than the strict rule against perpetuities permits,[1] or until it shall have been increased to a certain size, though many years must elapse before this aim will be achieved,[2] is valid, being vested at once, though it will not actually dispense charity until after the statutory period has expired. A gift for the purpose of promoting education, which provides that, before any money

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[17] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 280, 281.

[18] 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 203, 204, 41 N. E. 231.

[19] 1897, Ingraham v. Ingraham, 169 Ill. 432, 450, 48 N. E. 561, 49 N. E. 320. But see 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 524, 67 C. C. A. 393 (Affirming 126 Fed. 796); 1882, Iseman v. Myers, 26 Hun 651 (N. Y.).

[20] 1865, Odell v. Odell, 92 Mass. (10 Allen) 1, 13.

[21] 1909, Kasey v. Fidelity Trust Co., 131 Ky. 609, 623, 115 S. W. 739.

[22] 1905, Codman v. Brigham, 187 Mass. 309, 313, 72 N. E. 1008, 105 Am. St. Rep. 394.

[1] 1899, Duggan v. Slocum, 92 Fed. 806, 808, 34 C. C. A. 676 (Affirming 83 Fed. 244).

[2] 1897, Ingraham v. Ingraham, 169 Ill. 432, 455, 48 N. E. 561, 49 N. E. 320; 1914, Ripley v. Brown, 218 Mass. 33, 105 N. E. 637.

is paid to any beneficiary, such beneficiary shall agree to restore the amount received and begin such restoration within five years after entering upon his life's work, contemplates the use of the restored sums for the same purposes, and hence does not lead to a forbidden accumulation.[3] The will of Benjamin Franklin provided for an accumulation for two full centuries before it was to become available in its entirety to the cities of Boston and Philadelphia, and has been upheld by both the Massachusetts and Pennsylvania courts,[4] but the question was not directly presented.

§ 552. **Accumulations. Invalidity.** Something more than mere length of time is necessary to make directions for accumulations void and of no effect. A charity for the payments of annuities will not be void as creating an unlawful accumulation unless it is a mere cover to screen such an accumulation.[5] It is as much the policy of the law to favor an accumulation for charitable objects as to favor charitable objects themselves.[6] A provision for an accumulation which is not carried beyond the limits of a sound public policy is, therefore, valid in the case of a public charitable trust,[7] and will not be declared void though it is perpetual where the legislature, by a special statute, has expressly sanctioned it.[8] "To authorize equitable interference with the accumulation directed by the testator, the accumulation should be unreasonable, unnecessary, and to the public injury."[9] While charitable trusts, which vest and become operative within the period limited by law, may be established in perpetuity and may even be so constituted as to gradually increase in size by reasonable additions from the annual income,[10] a different situation exists where such accumulation is so unreasonable as ultimately to draw into its vortex all the

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[3] 1922, In re Davidge Will, 193 N. Y. Supp. 245, 200 App. Div. 437.

[4] See p. 365.

[5] 1917, In re Sayre, 166 N. Y. Supp. 499, 179 App. Div. 269.

[6] 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 203, 204, 41 N. E. 231.

[7] 1914, Collector of Taxes v. Oldfield, 219 Mass. 374, 377, 106 N. E. 1014.

[8] 1914, Oldfield v. Attorney General, 219 Mass. 378, 106 N. E. 1015.

[9] 1895, St. Paul's Church v. Attorney General, supra.

[10] 1893, Woodruff v. Marsh, 63 Conn. 125, 137, 138, 26 Atl. 846, 38 Am. St. Rep. 346.

property of the state.[11] A gift of the surplus money of an estate, to be applied at the rate of ten dollars a month during the winter months, is void as an unreasonable direction for an accumulation where such residue is $18,000 so that its income (not to speak of the principal) can never be wholly expended.[12] A donation to be invested and reinvested until it shall equal the debt of the state of Pennsylvania is void for remoteness. The event may never happen.[13]

§ 553. **Accumulation and Principal Gift separable.** The principal gift and the directions for an accumulation are not so intertwined and interwoven that both will necessarily be either upheld or cast down. While it will not be possible to reject the principal gift and uphold the accumulation, which is but an incident of it, cases may very easily arise which call for the rejection of the incident though the principal is upheld.[14] "Where a vested estate is distinctly given, and to it is annexed a trust for accumulation, which violates the rule against perpetuities, the principal or vested estate will be valid, even though the trust for accumulation, so annexed to it, may be void."[15]

§ 554. **Request for Accumulation. Invalid in Part.** A direction for an accumulation need not even be valid in its entirety in order to be saved from destruction. While a gift which infringes against the perpetuity rule is void **in toto,** a trust for accumulation may be good to the extent that it does not transgress beyond the limits placed upon it.[16] A devise in trust to accumulate the rents and profits for fifty years for a charitable purpose is valid, even if the directions for accumulation are invalid in part.[17] A trust for accumulation, subject to certain annuities and payments to certain charities, is valid for the time that these payments continue.

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[11] 1849, Hillyard v. Miller, 10 Pa. (10 Barr.) 326, 335, 336.

[12] 1911, Collins v. Davis, 17 Ohio C. C. Rep. (N. S.) 221 (Affirmed 87 Ohio St. 504, 102 N. E. 1122).

[13] 1910, Girard Trust Co. v. Russell, 179 Fed. 446, 102 C. C. A. 592 (Affirming 171 Fed. 161).

[14] 1900, Dexter v. Harvard College, 176 Mass. 192, 196, 57 N. E. 371; 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 280.

[15] 1897, Ingraham v. Ingraham, 169 Ill. 432, 451, 48 N. E. 561, 49 N. E. 320; 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 196, 41 N. E. 231.

[16] 1893, In re Lennig, 154 Pa. 209, 213, 25 Atl. 1049.

[17] 1865, Odell v. Odell, 92 Mass. (10 Allen) 1.

Whether it will be valid thereafter is a different question.[18]

§ 555. **Summary. Perpetuities.** The rule against perpetuities is a preventive measure devised, 1, to forestall the perpetual accumulation of individual wealth, especially in family groups, thus pampering a spurious aristocracy and taking property out of commerce; 2, to prevent the creation of expectant estates and future contingent interests beginning beyond a limited period fixed by the law. Using the word in the first sense, it is clear that it does not apply to charitable trusts, which accordingly may be created to endure forever and may even shift on remote contingencies from one charity to another. The question, whether trusts are charitable in the eyes of the law, is, of course, of immense importance in this connection. While a gift for the perpetual upkeep of testator's burial plot will generally, in the absence of a statute, be void as a perpetuity, on the ground that no public charity is involved, a gift to perpetually keep an entire cemetery in good condition will generally be valid on the ground that it creates a valid public charity. In its second sense the rule, however, has application to charitable trusts and has resulted in nullifying them. While charity is highly favored, while charitable trusts are liberally construed with a view to uphold them, a charitable trust, which is intended to vest beyond the period of time limited by the rule against perpetuities, will not be upheld except in the single case where it depends upon another charitable trust which has actually vested within such period. If the law were otherwise, testators could, under the guise of eventually bestowing their property upon charity, vest it in an unlimited succession of private donees and thus play havoc both with the rule itself and with the policy upon which it is founded.

§ 556. **Summary. Accumulations.** Whether a direction for an accumulation of a fund donated to charity is valid or void, is generally left unregulated by the statutes, and must, therefore, be disposed of by the courts on general lines of policy. It will, on the one hand, not be subjected to the same rules that apply to private gifts, nor will it, on the other hand, be treated as valid forever. If reasonable, it

[18] 1901, Young v. St. Mark's Lutheran Church, 200 Pa. 332, 336, 49 Atl. 887.

may, however, outrun the period fixed by the statute against perpetuities. Even if void, it will be considered as an incident of the gift and will, therefore, not necessarily render such gift void. It may even be partially void without thereby vitiating the entire accumulation.

CHAPTER XIV

CONSTRUCTION

§ 567. **Private and Charitable Trusts. Distinction.** The Massachusetts constitution expressly makes it the duty of magistrates "to countenance and inculcate the principles of humanity and general benevolence, public and private charity,"[1] and enjoins on the Massachusetts courts a liberal construction of charitable trusts.[2] Such construction, however, is not confined to Massachusetts. The philanthropic spirit manifested by such gifts prompts all the American courts to sustain them wherever they conform to well established precedents, liberally construed.[3] Relief is, therefore, afforded to charities under circumstances under which it would be denied in ordinary cases.[4] The test of reasonableness has no place between the next of kin and a charitable trust.[5] Trusts which, as ordinary testamentary dispositions, would be void, will be upheld if they are of a charitable nature,[6] on the ground that the principles which govern private trusts are wholly inapplicable to public charities.[7] This difference is not an artificial one, but is inherent and fundamental.[8] "From the most ancient times, courts of chancery in England have applied very different rules in determining the validity of charitable bequests, from the rules applied to such as were not charitable."[9] Courts have looked with kindliness upon charitable gifts, and rather than

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[1] Chapter 5, Paragraph 2, Massachusetts constitution.

[2] 1917, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, 948, Ann. Cas. 1918, B. 1204.

[3] 1917, Jones v. Patterson, 271 Mo. 1, 195 S. W. 1004.

[4] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 559, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[5] 1919, Matter of Morris, 227 N. Y. 141, 124 N. E. 724.

[6] 1858, Appeal of Domestic and Foreign Missionary Society, 60 Pa. (6 Casey) 425, 434; 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 367; 1836, Sanderson v. White, 35 Mass. (18 Pick.) 328, 333, 29 Am. Dec. 591.

[7] 1848, Griffith v. State, 2 Del. Ch. 421, 459; 1875, Doughten v. Vandever, 5 Del. Ch. 51, 63; 1882, Beckwith v. St. Philips Parish, 69 Ga. 564, 569.

[8] 1885, Richmond v. Davis, 103 Ind. 449, 454, 3 N. E. 130. Approved 1904, Phillips v. Heldt, 33 Ind. App. 388, 398, 71 N. E. 520.

[9] 1872, Newson v. Starke, 46 Ga. 88, 93.

allow benevolent intentions to prove abortive, have gone to the full length of their ability to fulfill them.[10] Once it is found that a trust is charitable, the rules applicable to private trusts fail to apply, and the question of its survival, interpretation, and enforcement is controlled by those essential principles of equity and practices of courts which deal with great favor with public trusts.[11] It is eminently proper that charities should be thus favored as against other trusts, since their objects strongly recommend themselves to the Christian philanthropists of all nations and justly meet the favor of the courts.[12] "We know of but few things of earthly institution which more impressively proclaim the lesson of our common humanity than one of those ancient charities, which, descending from a remote past to a remote future, knitting the generations together, dispenses its good gifts continually by the way."[13] In so far as the statute of Elizabeth recognizes, defines, or indicates what are charitable uses, it is part of the common law and undoubtedly has influenced the courts of this country in the direction of a liberal construction of the instruments which undertake to create them.[14]

§ 568. **Reason for Distinction.** The reason for this distinction between private and charitable trusts is clear. The sentiment expressed by the Apostle Paul that charity never faileth has "ever dwelt in the heart of man as the better part of him. It has been crystallized into the governmental system of every civilized community and in none more significantly than those blessed with the common law."[15] Since charity in its popular sense, though temporary, limited, and fleeting, is considered as a duty, it will receive public favor when it assumes the form of permanence and extensive diffusion.[16] No principle of law is, therefore, more firmly established than that which requires a court to sustain a charitable gift and to favor any legally permissible con-

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[10] 1920, In re Wilson, 111 Wash. 491, 191 Pac. 615.

[11] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 793.

[12] 1865, White v. Hale, 42 Tenn. (2 Cold.) 77, 81; 1918, Gould v. Board of Home Missions, 102 Neb. 526, 167 N. W. 776.

[13] 1884, Pell v. Mercer, 14 R. I. 412, 439.

[14] 1909, Klumpert v. Vrieland, 142 Iowa 434, 438, 121 N. W. 34.

[15] 1903, Danforth v. Oshkosh, 119 Wis. 262, 281, 97 N. W. 258.

[16] 1854, Franklin v. Armfield, 34 Tenn. (2 Sneed.) 305, 345.

struction of the instrument creating it, leading to the carrying out of the purpose of the donor.[17] "When in times like the present vast wealth is accumulated in the hands of individuals, it is not only desirable, but highly commendable, for persons possessed of large estates to set apart portions thereof for religious and charitable purposes."[18] To carry out charitable gifts promotive of important public and benevolent purposes is in accordance with the enlightened and philanthropic spirit of the age. With such a spirit, the jurisprudence of the country is keeping pace.[19]

§ 569. **Expressions of Courts.** The tendency to construe charitable gifts liberally is fostered by the very manner in which questions involving them come before the courts. The heirs usually appear in the ungracious attitude of seeking to frustrate the testator's benevolent wishes, while the opposite side has the adventitious aid of human sympathy. It is positively painful to courts to disappoint the intentions which a testator has entertained, particularly when they relate to charity.[20] Even aside from these considerations, such cases are "peculiarly calculated to enlist the judgment on the side of the affections."[21] Charitable uses are viewed by the courts with double favor, 1, on account of their meritorious motive; 2, on account of the public advantage.[1] A will, which is pervaded from beginning to end with broad and delicate charity, will not be approached by them in a spirit of criticism and with a view to break and destroy it.[2] They will favor heirs, but will favor charities even more than heirs, certainly collateral heirs.[3] They will not hold a charity to be void "if it can possibly be made good."[4] They

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[17] 1906, Trenton Society v. Howell, 63 Atl. 1110, 1111 (N. J.).

[18] 1908, In re Kessler, 221 Pa. 314, 320, 70 Atl. 770, 128 Am. St. Rep. 741.

[19] 1845, American Bible Society v. Wetmore, 17 Conn. 181, 189.

[20] 1845, Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94.

[21] 1820, Griffin v. Graham, 8 N. C. (1 Hawks) 96, 127, 9 Am. Dec. 619.

[1] 1913, Succession of Villa, 132 La. 714, 717, 61 So. 765.

[2] 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 210, 79 S. W. 831.

[3] 1889, Appeal of Seagrave, 125 Pa. 362, 377, 17 Atl. 412.

[4] 1881, In re Hinkley, 58 Cal. 457, 513; 1909, Klumpert v. Vrieland, 142 Iowa 434, 437, 121 N. W. 34.

will not balk or halt at imaginary difficulties.[5] They will not lean against bequests for charitable purposes in favor of claimants under the statute of distribution, but will lean in favor of charities.[6] They will not be painstaking in searching for a construction which nullifies a will if there is a reasonable interpretation which will uphold it.[7] They will not speculate as to possible happenings in order to defeat a will.[8] They will not extend themselves to disappoint the donor's pious and charitable intention which may have consoled him in his departing hour.[9] They will not apply an astute, narrow and uncharitable construction to technical propositions contained in a will in order to divert the legacy of a pious woman from an object dearer to her than life itself.[10] They will look at an instrument which seeks to create a charity with a keen eye to discover reasons for sustaining it.[11] They are always favorably inclined toward the establishment of libraries and hospitals, and of all public institutions whose purpose is to ameliorate the condition of mankind.[12] They will take special care to enforce charitable gifts, to guard them from assault, and protect them from abuse.[13] They will consider it incumbent on them to preserve charities by sustaining their validity unless legal barriers stand in the way and compel them to strike them down.[14] They will sustain such bequests unless the language used renders it impossible for them to determine the donor's intent,[15] or unless upon their face they are opposed to some

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[5] 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 329, 120 S. W. 283.

[6] 1879, Dodge v. Williams, 46 Wis. 70, 91, 50 N. W. 1103, 1 N. W. 92.

[7] 1900, Bennett v. Baltimore Humane Impartial Society, 91 Md. 10, 18, 45 Atl. 888.

[8] 1917, Haggin v. International Trust Co., 169 Pac. 138, 142 (Colo.).

[9] 1835, Burr v. Smith, 7 Vt. 241, 307, 29 Am. Dec. 154.

[10] 1815, Phillips Academy v. King, 12 Mass. 546, 563.

[11] 1910, Girard Trust Co. v. Russell, 179 Fed. 446, 450, 102 C. C. A. 592 (Affirming 171 Fed. 161).

[12] 1897, Beurhaus v. Watertown, 94 Wis. 617, 629, 69 N. W. 986.

[13] 1904, Jenkins v. Berry, 119 Ky. 350, 360, 26 Ky. Law Rep. 1141, 83 S. W. 594; 1912, Greer v. Synod Southern Presbyterian Church, 150 Ky. 155, 159, 150 S. W. 16.

[14] 1894, In re Croxall, 162 Pa. 579, 580, 29 Atl. 759.

[15] 1911, Smith v. Gardiner, 36 App. D. C. 485, 486.

rule of law.[16] They will uphold such trusts "if a way can be found to do so without violating sound reason and recognized principles of law."[17] Charities thus are the favorites of equity. Springing, as they usually do, from the very best that is in human nature, and having for their object the amelioration of the hard conditions of those who are at odds with fate and fortune, it is the policy of an enlightened jurisprudence to uphold and sustain them wherever this can be done without violation of positive principles of law.[18] All authorities, therefore, "evince a disposition to be liberal in the construction of such gifts and to hold them valid and enforcible if they are possible of execution, and to declare only those invalid and unenforcible which are impossible of execution."[19] It is emphatically a liberal interpretation which is employed in construing them.[20]

§ 570. **Expressions of Courts. Continued.** No doubt can be entertained of the high favor with which charities are regarded by the courts.[21] "Testamentary donations for meritorious objects, and within the limits prescribed by law, are universally favored."[22] It is "hornbook doctrine"[23]

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[16] 1874, Ould v. Washington Hospital for Foundlings, 1 MacArthur 541, 549, 29 Am. Rep. 605 (Affirmed 95 U. S. 303, 24 L. Ed. 450).

[17] 1904, In re Merchant, 143 Cal. 537, 540, 77 Pac. 475.

[18] 1909, Green v. Fidelity Trust Company, 134 Ky. 311, 329, 120 S. W. 283.

[19] 1921, Palmer v. Oiler, 102 Ohio St. 271, 277, 131 N. E. 362, 364.

[20] 1921, Prime v. Harmon, 120 Me. 299, 113 Atl. 738, 740; 1923, Nixon v. Brown, —— Nev. ——, 214 Pac. 524, 530. See 1922, Loomis Institute v. Healy, 98 Conn. 102, 119 Atl. 31; 1923, First Congregational Society of Bridgeport v. Bridgeport, —— Conn. ——, 121 Atl. 77, 80.

[21] 1884, Coit v. Comstock, 51 Conn. 352, 377, 50 Am. Rep. 29; 1901, Troutman v. De Boissiere Odd Fellow's Orphan's Home, 64 Pac. 33, 36, 5 L. R. A. (N. S.) 692 (Kans.); 1888, Kinney v. Kinney, 86 Ky. 610, 614, 6 S. W. 593, 9 Ky. Law Rep. 753; 1906, Crow v. Clay County, 196 Mo. 234, 261, 95 S. W. 369; 1907, Hadley v. Forsee, 203 Mo. 418, 426, 101 S. W. 59; 1900, St. James Orphan Asylum v. Shelby, 60 Neb. 796, 804, 84 N. W. 273, 83 Am. St. Rep. 553; 1883, Sowers v. Cyrenius, 39 Ohio St. 29, 35, 48 Am. Rep. 418; 1906, Hunt v. Edgerton, 29 Ohio Cir. Ct. Rep. 377, 383, 19 Ohio Cir. Ct. Dec. 377, (Affirmed 75 Ohio St. 594, 80 N. E. 1126); 1887, Raley v. Umatilla County, 15 Ore. 172, 183, 13 Pac. 890, 3 Am. St. Rep. 142; 1877, Ould v. Washington Hospital, 95 U. S. 303, 313, 24 L. Ed. 450 (Affirming 1 MacArthur 541, 29 Am. Rep. 605); 1889, Duggan v. Slocum, 92 Fed. 806, 808, 34 C. C. A. 676 (Affirming 83 Fed. 244).

[22] 1866, Bascom v. Albertson, 34 N. Y. 584, 620.

[23] 1912, Strother v. Barrow, 246 Mo. 241, 250, 151 S. W. 960.

that such trusts are "favored nurslings"[1] of modern jurisprudence, entitled to peculiar favor.[2] It is, therefore, a liberal interpretation which must be employed in construing them.[3] This doctrine is one among a number of instances in which the courts have, by precedent upon precedent, engrafted into our jurisprudence principles and doctrines which have no particular legislative authority to sustain them, and it has become so firmly fixed that no matter how much its policy may at this day be questioned or denied, each "opportunity for questioning them, furnishes a precedent for sustaining them."[4] The most liberal rules within the allowable limits of chancery jurisdiction will, therefore, be resorted to to uphold charitable bequests.[5] So firmly is this doctrine established that it comes to the surface even in states which have radically narrowed the jurisdiction over charitable trusts[6] such as Maryland[7] and Virginia.[8] Though in Virginia legacies to churches are void, the court has upheld a codicil reciting that testator "owed" a church $600, and has directed the executor to pay it.[9] In Maryland a gift to an incorporated church, the interest to be paid to the board of foreign missions, has been upheld as giving the fund to the church for the promotion of its foreign mission work through the general church agency provided as the medium for such activities.[10]

§ 571. **Consequences of this Attitude.** The practical consequences stand out in bold relief. "It seems to have been always agreed upon, from an early period in the Roman law to the present time, that such gifts are to receive a

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[1] 1867, Cromie v. Louisville Orphan's Home Society, 66 Ky. (3 Bush) 365, 375.

[2] 1920, Herron v. Stanton, — — Ind. App. ——, 128 N. E. 363, 366.

[3] 1921, Prime v. Harmon, 120 Me. 299, 113 Atl. 738, 740; 1922, Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796, 800.

[4] 1863, Paschal v. Acklin, 27 Tex. 173, 197.

[5] 1920, Hodge v. Wellman, 191 Iowa 877, 179 N. W. 534.

[6] 1896, In re John, 30 Ore. 494, 525, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

[7] 1884, Barnum v. Baltimore, 62 Md. 275, 296, 50 Am. Rep. 219; 1901, Woman's Foreign Missionary Society v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711.

[8] 1804, Charles v. Hunnicutt, 9 Va. (5 Call.) 311, 327, 330. This, however, was an early case.

[9] 1899, Perkins v. Siegfried, 97 Va. 444, 34 S. E. 64.

[10] 1919, Board of Foreign Missions v. Shoemaker, 133 Md. 594, 105 Atl. 748.

most liberal construction."[11] Whatever, however, the situation may have been, there can be no doubt what it is. Courts not only favor charities theoretically, but translate their favorable attitude toward them into action by taking special care to enforce them and by indulging in every presumption consistent with the language used to sustain them.[12] To accomplish this object, they resort to many ingenious devices and to a very refined construction, and resolve all doubts in favor of them.[13] In other words, they indulge in a most liberal construction of them.[14] "A liberal spirit pervades the law relating to charitable gifts."[15] A will which violates no law is as much respected by the courts as is the testator's grave.[16] A charitable gift above all others will be so construed **ut res magis valeat quam pereat,**[17] and will be upheld if its purpose and the class of beneficiaries are ascertainable by the most liberal methods of investigation.[18] A gift distributed in private by private individuals to private beneficiaries, under a testamentary direction that it "is strictly for private charities" has, therefore, been held, nevertheless, to be a public charitable trust, its beneficiaries being indefinite.[19] An executory devise will be construed out of a will where a charity is involved, though otherwise no such action

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[11] 1853, Urmay v. Wooden, 1 Ohio St. 160, 163, 59 Am. Dec. 615.

[12] 1912, Franklin v. Hastings, 253 Ill. 46, 50, 97 N. E. 265, Ann. Cas. 1913, A. 135.

[13] 1914, Wilson v. First National Bank, 164 Iowa 402, 414, 145 N. W. 948. Ann. Cas. 1916, D. 481; 1920, **In re** Walden, 190 Iowa 567, 180 N. W. 679.

[14] 1856, Grissom v. Hill, 17 Ark. 483, 488; 1899, **In re** Upham, 127 Cal. 90, 94, 59 Pac. 315; 1911, Louis v. Gaillard, 61 Fla. 819, 845, 56 So. 281, Whitefield C. J. dissenting; 1848, Beall v. Fox, 4 Ga. 404, 427; 1913, Dykeman v. Jenkines, 179 Ind. 549, 555, 101 N. E. 1013, Ann. Cas. 1915, D. 1011; 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 797; 1909, Hagen v. Sacrison, 19 N. D. 160, 173, 123 N. W. 518, 26 L. R. A. (N. S.) 724; 1851, Zanesville Canal and Mfg. Co. v. Zanesville, 20 Ohio 483, 488; 1874, Miller v. Teachout, 24 Ohio St. 525, 532, 533; 1848, Beaver v. Filson, 8 Pa. (8 Barr.) 327, 335; 1847, Castleton v. Langdon, 19 Vt. 210.

[15] 1920, **In re** Burnham, 183 N. Y. Supp. 539, 543.

[16] 1899, Succession of Meunier, 52 La. Ann. 79, 85, 26 So. 776, 48 L. R. A. 77.

[17] 1865, Saltonstall v. Sanders, 93 Mass. (11 Allen) 446, 455.

[18] 1912, Richtman v. Watson, 150 Wis. 385, 399, 136 N. W. 797.

[19] 1889, Bullard v. Chandler, 149 Mass. 532, 542, 21 N. E. 951, 5 L. R. A. 104.

would be taken.[20] A condition providing for a reversion of the property, if it is not within three years used for an orphanage, has been so construed that the heirs who, by bringing a suit, have prevented the active appropriation of the property to the charity within such time, have not been allowed to benefit thereby.[21] Similarly, a charitable gift which provided that it was to be accepted by the Y. W. C. A. donee within one year after the donor's death, and was to lapse if not performed within two years after coming into possession, has been held not to be invalidated by the fact that the donee for three years was unaware of the gift and hence unable to accept it.[22] Where an owner made a deed of his real estate for the benefit of his relatives, and then made a will in which he attempted to make needy relatives a separate class of charitable donees, and created four classes of genuinely charitable character, the Indiana court has confined the invalidity of the gift for needy relatives to the real estate and has upheld the will as to the other classes.[23] A condition of forfeiture has been so construed as to reduce it to comparative impotence.[24]

§ 572. **Limits of Liberal Construction. Generally.** The favor thus shown and liberal construction thus accorded are not without limit. In some instances, indeed, this favor has gone almost so far as to become uncharitable. Charity is the most amiable of virtues, and, more than any other, commands our sympathy and applause, but, more than any other, it needs the aid of enlightened reflection and the direction and control of sound judgment. If the execution of every trust which a mistaken philanthropy may create were to be decreed, the courts would frequently, instead of relieving distress, promoting industry, or assisting virtue, support the

[20] 1830, Inglis v. Sailor's Snug Harbor, 28 U. S. (3 Pet.) 99, 7 L. Ed. 617. Thus, a residuary clause has been construed in favor of a charity over the vigorous objection that this construction inflicts a glaring injustice on the heirs. 1922, Brinsmade v. Beach, 98 Conn. 322, 119 Atl. 233.

[21] 1920, Peek v. Woman's Home Missionary Society, 293 Ill. 337, 127 N. E. 760.

[22] 1922, Woman's Seaman's Friend Society v. Boston Y. W. C. A., 240 Mass. 521, 134 N. E. 601.

[23] 1922, Reasoner v. Herman, —— Ind. ——, 134 N. E. 276, 281.

[24] 1922, Peek v. Woman's Home Missionary Society, 304 Ill. 427, 136 N. E. 772.

idle, encourage the dissolute, and promote the criminal.[1] Charity, which extends material benefit without destroying or undermining the character of its beneficiaries, is indeed a goal which is not easy to attain. Planless charity is not attracted to the place where help is most effective, but goes where sentiment is most immediately touched. The indiscriminate bestowal of charity upon the poor and needy, by discouraging habits of industry and self-reliance, has a tendency to create the pauperism which it is professedly designed to alleviate.[2] If bequests for charity have been the means of doing much social good, they are certainly chargeable with great countervailing evils and have often been the source of great corruption and abuse. They have perhaps more frequently proved to be the subject of protracted, wasteful, and perplexing litigation than of public utility.[3] Says the United States Supreme Court: "When we look into the history of charities in England, and see the gross abuses which have grown out of their administration, notwithstanding the enlarged powers of the courts, aided by the prerogative of the sovereign and the legislation of Parliament, doubts may be entertained whether they have, upon the whole, advanced the public good."[4] Where caprice and vanity, rather than reason and love, prompt a charitable gift, where the nicest care is not exercised in its proper distribution, the effect may actually be a curse instead of a blessing. Charity is like a medicine which, properly administered, cures the sick, but, improperly applied, poisons the healthy. The extraordinary favor shown to it should not, therefore, be allowed to be instrumental in establishing in perpetuity institutions which are detrimental to the community or which actually create the evil which they are intended to alleviate. The right of an owner of property to dedicate it in perpetuity to any purpose however fantastical, useless, or ludicrous, not immoral, should be strictly watched and regulated. "There must be some limit in the interpretation of a trust, more

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[1] 1849, Ayers v. M. E. Church, 5 N. Y. Super. Ct. (3 Sandf.) 351, 377, 8. N. Y. Leg. Obs. 17.

[2] 1878, Taylor v. Keep, 2 Ill. App. (2 Bradw.) 368, 380.

[3] 1863, Paschal v. Acklin, 27 Tex. 173, 197.

[4] 1850, Wheeler v. Smith, 50 U. S. (9 How.) 55, 78, 13 L. Ed. 44.

definite than the fervid fancy of a judge."[5] This limitation accordingly will be found, 1, in statutory restrictions; 2, in the will of the donor.

§ 573. **Donor's Intent will be regarded.** A testator must have intended to create a charity before the courts will hold a gift to be a charitable trust. They have no more power to make wills for the dead than they have to make contracts for the living.[6] They have the solemn duty of upholding the will of an individual after his death as much as they uphold his contracts made in his lifetime.[7] If a bequest is, therefore, not a charitable one, the courts cannot and will not make it such by an alteration.[8] "A will should not be so construed as to place in the testator's mouth that which never entered his mind."[9] Sedulously as the courts strive to uphold charitable gifts, such result cannot be attained contrary to the clearly expressed intentions of the testator.[10] "Even in case of a charity, an imperfect gift will not be turned into a declaration of trust, for no better reason than that it is imperfect. Courts sometimes relieve against defects in conveyances to charitable purposes where there is simply uncertainty as to who are meant to be the trustees or the **cestui que trustent.** They do not supply conveyances, where there are none."[11] The same holds good where the gift has been limited and the limit has been reached. "The favor shown to charities should not be carried to the point of over-riding the plainly expressed limits of a gift."[12]

§ 574. **Meaning must be gathered from Words.** In searching for the donor's intention, the courts are not at liberty to disregard his language. It is their duty to "ascertain the **quod voluit** by realizing the **quod dixit.**"[13] Testa-

[5] 1892, Kelly v. Nichols, 18 R. I. 62, 65, 25 Atl. 840, 19 L. R. A. 413.

[6] 1879, Dodge v. Williams, 46 Wis. 70, 90, 50 N. W. 1103, 1 N. W. 92.

[7] 1909, Klumpert v. Vrieland, 142 Iowa 434, 436, 121 N. W. 34.

[8] 1901, Mason v. Perry, 22 R. I. 475, 493, 48 Atl. 671.

[9] 1891, New Orleans v. Hardie, 43 La. Ann. 251, 257, 9 So. 12.

[10] 1878, Taylor v. Keep, 2 Ill. (2 Bradw.) 368, 383.

[11] 1909, Organized Charities Association v. Mansfield, 82 Conn. 504, 510, 74 Atl. 781, 135 Am. St. Rep. 285.

[12] 1889, Stratton v. Physio Medical College, 149 Mass. 505, 509, 21 N. E. 874, 5 L. R. A. 33, 14 Am. St. Rep. 442.

[13] 1891, New Orleans v. Hardie, 43 La. Ann. 251, 254, 9 So. 12.

tor's words as applied to the circumstances under which they have been written are the blazed trail which the courts must follow in all its turns and windings, through swamps and over hills, except where it trespasses on forbidden territory. A gift to a free library to be **established** in Philadelphia will, therefore, not be applied to one of two **existing** libraries in such city.[14] Conversely, a bequest to an old ladies' home, "if any such are organized in the state," cannot be applied to a home organized after the death of testatrix.[15] Under a will to a college to be established on a lot to be dedicated by testator in the city of his residence, or if no such dedication is made to two designated colleges, such two colleges are entitled to take where the testator has failed to dedicate a lot as against a college organized after his death and which by purchase had acquired a lot in the city.[16] A gift to a **city** for a Carnegie library goes to the city and not to library trustees who have charge of the public library of the city.[17] However, where two libraries in a city have formed an alliance and are operated as one under the name, "Free Library Association," a gift to such association will be construed to be intended for both.[18] A gift for the express purpose of purchasing and equipping a public park in a city as a memorial to the donor's name cannot be used to reimburse the city for money spent in the purchase and improvement of a park which it already has.[19] Gifts to institutions "**similar**" to certain institutions named cannot be enjoyed by those very institutions. They are referred to as objects of comparison to guide the selection, not as proper objects

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[14] 1893, Pepper's Estate, 154 Pa. 331, 25 Atl. 1058. See also 1877, Holden v. Cook County, 87 Ill. 275. However, a gift for the "support" of a free school will be construed so as not to eliminate from consideration schools not founded at the time of testator's death. 1918, Laswell v. Hungate, 256 Fed. 625, 168 C. C. A. 29 (Certiorari denied 249 U. S. 612, 63 L. Ed. 801, 39 S. Ct. 386). In 1922, McCran v. Kay, 93 N. J. Eq. 352, 115 Atl. 649, the same principle was applied to a hospital the court refusing a **cy pres** application.

[15] 1895, Bond v. Home for Aged Women of Cedar Rapids, 94 Iowa 458, 62 N. W. 838.

[16] 1895, Emory and Henry College v. Shoemaker College, 92 Va. 320, 23 S. E. 765.

[17] 1906, Board of Library Trustees of Hanford v. Board of Trustees of Hanford, 2 Cal. App. 760, 84 Pac. 227.

[18] 1922, **In re** Shand's Estate, 275 Pa. 77, 118 Atl. 623.

[19] 1922, McKevitt v. Sacramento, 55 Cal. App. 117, 203 Pac. 132, 136.

for selection. A thing is not similar to itself, for similarity is not identity but resemblance between different things.[20] A devise, made in 1684 to a congregation for the support and maintenance of its minister, which had grown enormously in value, is a devise to the congregation and not to the ministers of the denomination to which it belongs.[21] Where a testator creates a fund of $112,500, which "aforesaid sum" is to be invested for a time and then paid over in certain proportions to certain public corporations for charitable purposes, a great increase in value of the securities in which the fund is invested does not inure to the heirs but will be distributed proportionately among the charities designated by the testator.[22]

§ 575. **Vague Wish by Testator.** The mere vague wish of a testator to create a charity is not enough to sustain it. He must define his wish sufficiently to enable the courts to carry it out. Before resort can be had to any liberal construction, the object of the gift must be certain, or some one must be appointed with power to render it certain.[23] Though the purpose to create a charity of a limited and special character appears where the will fails to disclose the limitation, the courts cannot, in defiance of the statute of wills, add to the will verbal expressions of the testator to supply and define such limitations.[24]

§ 576. **Mortmain and Perpetuity Statutes.** There is another check on such liberal construction in the form of mortmain and perpetuity statutes.[25] Where charitable gifts come in conflict with such statutes, it is clear that they must bend to the statute rather than that the statute must bend to them. All strained judicial construction in favor of particular interests tend to disturb that social equality which the general and uniform laws, operating in connection with the natural impulses of men, are calculated to produce.

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[20] 1888, Rhode Island Hospital Trust Co. v. Olney, 16 R. I. 184, 13 Atl. 118.

[21] 1867, Attorney General v. Reformed Protestant Dutch Church, 36 N. Y. 452.

[22] 1922, McElwain v. Allen, 241 Mass. 112, 134 N. E. 620.

[23] 1915, Volunteers of America v. Peirce, 267 Ill. 406, 412, 108 N. E. 318 (Reversing 187 Ill. App. 428).

[24] 1895, Smith v. Smith, 54 N. J. Eq. (9 Dick) 1, 32 Atl. 1069 (Affirmed 55 N. J. Eq. (10 Dick) 821, 41 Atl. 1116).

[25] See Chapters 12 and 13.

"Even if meritorious trusts fail because the instruments attempting to create them are defective for not complying with statutory provisions, this cannot change the rule of construction."[26] It is better that a meritorious object fail than that courts should falter in giving full effect to wise and salutory restrictions. It is the duty of the courts to expound and declare the law, not to make it. The predelections of the judiciary are no excuse for an encroachment upon the province of the legislature. Courts must, therefore, declare a use to be invalid if it is not authorized by law or if the power of alienation is suspended by it for a longer term than the legislature has prescribed. Charitable intentions, laudable and honorable to the humane and benevolent feelings of testators, should be carried out if they have been manifested in a legal manner, and can be executed in harmony with well settled principles of law. If, however, violence must be done to the language used by donors, or well-known and long established legal principles must be overturned to effectuate the gifts, a different question is presented.[1]

§ 577. **Ambiguous Language.** It sometimes happens that a provision seeking to create a charity is couched in ambiguous language, or in language which covers both valid and invalid gifts. The law is clear in such cases. Where an invalid gift is inextricably commingled with a valid charity, both must go down together.[2] Where, however, the illegal part is a mere unimportant accessory to the main gift, the invalidity of the accessory will not affect the principal donation.[3] Any doubt will be solved in favor of the charity. Where a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or in an unlawful manner, the gift will be supported, and its application will be re-

[26] 1876, Ruth v. Oberbrunner, 40 Wis. 238, 258.

[1] 1858, Beekman v. People, 27 Barb. 260, 269 (Affirmed 23 N. Y. 298, 80 Am. Dec. 269).

[2] 1896, Wheelock v. American Tract Society, 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; 1857, McCaughal v. Ryan, 27 Barb. 376, 388 (N. Y.).

[3] 1897, Beurhaus v. Watertown, 94 Wis. 617, 629, 69 N. W. 986.

strained within the bounds of the law.[4] Where two modes of construction are possible, by one of which a charitable gift would be made an illegal perpetuity, while by the other it would be valid and operative, the latter mode of construction will be adopted.[5] A construction is preferred which is fairly within the rules of law and sustains the trust and devotes the fund to purposes permitted by law and to the good of humanity.[6] Where a provision which suspends the power of alienation can be expunged without destroying the general scheme, such gift will be upheld.[7] A bequest "for the benefit of fugitive slaves, who may escape from the slave-holding states" has, therefore, been construed as being made to help them with food, clothing, medicine and shelter, a purpose not unlawful under the fugitive slave laws.[8]

§ 578. **No technical Language necessary.** No set technical words are necessary to create a charitable trust.[9] A donor's intentions will not be defeated because they have not been expressed with completeness or technical accuracy. Equity will brush aside mere matters of form in the enforcement of a charitable trust,[10] will look to the will of the donor rather than to the formalities of the law,[11] will not defeat or overthrow such will on slight or trivial grounds,[12] will transpose words or limitations where such course is warranted by the immediate context or by the general scheme of the will,[13] and will aid a charity created by the exercise

[4] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556; 1895, St. Paul's Church v. Attorney General, 164 Mass. 188, 195, 196, 41 N. E. 231; 1892, United States v. Church of Jesus Christ of Latter Day Saints, 8 Utah 310, 342, 31 Pac. 436 (Reversed 150 U. S. 145, 37 L. Ed. 1033, 14 S. Ct. 44).

[5] 1897, Ingraham v. Ingraham, 169 Ill. 432, 453, 454, 48 N. E. 561, 49 N. E. 320; 1891, Dailey v. New Haven, 60 Conn. 314, 324, 22 Atl. 945, 14 L. R. A. 69; 1913, Dykeman v. Jenkines, 179 Ind. 549, 556, 101 N. E. 1013, Ann. Cas. 1915, D. 1011; 1899, Succession of Meunier, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77; 1912, In re Cunningham, 206 N. Y. 601, 100 N. E. 437.

[6] 1911, In re Robinson, 203 N. Y. 380, 388, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

[7] 1903, Smith v. Chesebrough, 176 N. Y. 317, 68 N. E. 625.

[8] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 570.

[9] 1886, Maught v. Getzendammer, 65 Md. 527, 532, 5 Atl. 471, 57 Am. Rep. 352.

[10] 1902, Farmers' and Merchants' Bank v. Robinson, 96 Mo. App. 385, 392, 70 S. W. 372.

[11] 1846, McCord v. Ochiltree, 8 Blackf. 15, 22 (Ind.).

[12] 1887, Raley v. Umatilla County, 15 Ore. 172, 183, 13 Pac. 890, 3 Am. St. Rep. 142.

[13] 1893, Woodruff v. Marsh, 63 Conn. 125, 133, 26 Atl. 846, 38 Am. St. Rep. 346.

of a power where a seal required to be used in executing it has been omitted.[14] A testator certainly will not be held to greater particularity of description or expression than is employed in the constitution and statutes of his state in regard to the words "free school."[15] Since words of request may create private trusts, they **a fortiori** may create charitable uses.[16] It follows that a charitable trust may be created by precatory words, and need not be created by technical words.[17] Nor will obscurity of language be suffered to defeat the purposes of a testator where a charity is involved.[18] The broadest liberality is allowed in ascertaining the intention of the testator, which, when ascertained, will be given effect without regard to the form of expression.[19] Where the language used, however impure, defective or inappropriate it may be, expresses the donor's intention sufficiently to create a charity, such intention becomes the pole star which guides the court in interpreting the meaning of his words and in construing the composition of his testament.[20] His language will be given such liberal and favorable construction as may be necessary to establish its validity and ascertain its meaning.[21] "No rule is more firmly established than that a charitable gift is not invalidated because of any mistake or ambiguity in expressing its purpose or describing its beneficiaries, if from the language of the will, construed in the light of all the facts and circumstances surrounding the devise or bequest, the intent of the donor is reasonably apparent."[22]

§ 579. **Examples of Liberal Construction. Validity.** Courts will go to great lengths in construing a gift to charity in such a manner that it will be upheld. They will act in a

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[14] 1850, **In re** Pepper, 1 Pars. Eq. Cas. 436, 451 (Pa.).

[15] 1918, Laswell v. Hungate, 256 Fed. 625, 168 C. C. A. 29 (Certiorari denied 249 U. S. 612, 63 L. Ed. 801, 39 S. Ct. 386).

[16] 1881, **In re** Hinkley, 58 Cal. 457, 513.

[17] 1910, Pembrooke Academy v. Epsom School District, 75 N. H. 408, 409, 75 Atl. 100, 37 L. R. A. (N. S.) 646.

[18] 1879, First Baptist Church v. Robberson, 71 Mo. 326, 333.

[19] 1904, Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 208, 79 S. W. 831.

[20] 1884, Peynado v. Peynado, 82 Ky. 5, 10, 5 Ky. Law Rep. 753.

[21] 1919, Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699, 701.

[22] 1910, Chapman v. Newell, 146 Iowa 415, 422, 125 N. W. 324.

very careful, painstaking manner,[1] and according to certain definite rules.[2] A hospital empowered to care for the "sick and hurt" may, therefore, take a gift for the "sick, hurt, injured and infirm."[3] A hospital, which has given up its building and confines its activities to maintaining free beds in another institution, does not lose a gift given on condition that it must not "cease to have an active existence from any cause whatsoever."[4] A gift to be used while the donee maintains "a hospital institution in Troy" does not lapse by the removal of the hospital from Troy.[5] A devise to a church to be applied to foreign missions will be construed to be in trust for such purpose where an absolute gift to the church would be unavailing on account of its limited capacity to take.[6] A donation provided that a certain person "should die leaving no children or lawful issue surviving her, or if such child or children should die leaving no lawful issue surviving," will be construed as intended to provide for the death of such child or children in the lifetime of the person named so as to preserve the charity from being void as a perpetuity.[7] An out-and-out bequest to the suffering poor of a certain town will be construed as authorizing an investment and even an accumulation until such time as proper beneficiaries come into existence.[8] An institution organized "for our own benefit," and for that of those who visit our city, will be upheld as a charity, the words "our benefit" being construed as referring to the people in the city where it is organized and not to the organizers only.[9] Where a charitable trust is dependent on a life estate, a rejection of it on the part of the beneficiary

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[1] 1895, Bond v. Home for Aged Women of Cedar Rapids, 94 Iowa 458, 62 N. W. 838.

[2] 1860, Howard v. American Peace Society, 49 Me. 288, 292, 302.

[3] 1905, Stearns v. Newport Hospital, 27 R. I. 309, 316, 62 Atl. 132.

[4] 1913, Rhode Island Hospital Trust Co. v. Rhode Island Homeopathic Hospital, 87 Atl. 177 (R. I.).

[5] 1907, In re Roche, 104 N. Y. Supp. 601, 602, 53 Misc. Rep. 187 (Appeal dismissed 104 N. Y. Supp. 1138, 106 N. Y. Supp. 1142).

[6] 1888, Kinney v. Kinney, 86 Ky. 610, 9 Ky. Law Rep. 753, 6 S. W. 593.

[7] 1909, Kasey v. Fidelity Trust Co., 131 Ky. 609, 617, 115 S. W. 739.

[8] 1860, Howard v. American Peace Society, 49 Me. 288, 306.

[9] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 555, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

corporation during the life of the life tenant is premature and does not prevent an acceptance after the death of the life tenant.[10] Where a gift to a public school provides for tuition, the court to sustain it, will construe such provision as referring only to such pupils as are legally liable to pay the same.[11] A mortmain statute, which prohibits testators from leaving more than a certain portion of their property to certain institutions or corporations, has even been construed not to limit the right of a testator to leave property to a trustee in trust for such institutions or corporations.[12] Under a statute declaring void any gift "for the benefit of any person and his successor or successors in any ecclesiastical office," a gift to "Rt. Rev. John P. Monaghan or his successor, the Rt. Rev. Bishop of Wilmington diocese," has been held to be valid as a gift to a person by the designation of his ecclesiastical office.[13] While no length of time can furnish a legal justification for the abuse of a charitable trust, it has a controlling weight on the question of the contemporaneous meaning of the terms used in the ancient instrument creating it.[14] "When the legal origin of a charity or a right is left in obscurity, the courts will presume, from the uniformity of the practice or use, that it is in accordance with the original foundation, or right, and will presume whatever may be necessary to give it validity."[15]

§ 580. **Other Examples of Liberal Construction.** The liberal construction of charitable gifts is not confined to the question of their validity, but extends to other matters as well. Where a will leaves the entire property to the donor's wife for life, and the codicil creates two bequests to charity, such bequests will not be construed to be subject to the

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[10] 1886, Augusta v. Walton, 77 Ga. 517, 1 S. E. 214.

[11] 1910, Maxcy v. Oshkosh, 144 Wis. 238, 262, 128 N. W. 899, 1138.

[12] 1907, Rine v. Wagner, 135 Iowa 626, 631, 113 N. W. 471; 1913, In re Cleven, 161 Iowa, 289, 295, 142 N. W. 986.

[13] 1918, Monaghan v. Joyce, 103 Atl. 582 (Del. Ch.).

[14] 1859, Attorney General v. Dublin, 38 N. H. 459, 512, 546; 1895, Church of Christ v. Reorganized Church of Jesus Christ, 71 Fed. 250, 17 C. C. A. 397, 36 U. S. App. 379 (Certiorari denied 163 U. S. 681, 41 L. Ed. 314, 16 S. C. Rep. 1199).

[15] 1861, Attorney General v. Reformed Protestant Dutch Church, 33 Barb. 303, 308 (Affirmed 36 N. Y. 452).

wife's life estate.[16] A home to be established "near" Reno may be established within the city limits, such being the testator's intentions.[17] **Vice versa**, a gift to the asylum for the blind **in** Spartanburg may be applied to an asylum for the deaf, dumb and blind **near** the city.[18] A magnificent gift for the erection of a graduate school on "the grounds" of Princeton University permits such erection on golf links separated from the university campus by other property, the equitable title to which was acquired by the university before the will was republished by a codicil, though the legal title was not acquired until after the donor's death.[19] A bequest to a library for the purpose of buying books, works of art, and for defraying the expense of taking care of the same permits an expenditure for the printing of a catalogue of such library.[20] Where charitable societies "directed, conducted, and administered by ecclesiastics" are excluded from participation, the mere fact that a clergyman is on the board of directors of the charity does not exclude it.[21] Where a city has only Catholic parochial schools, a bequest to it "for the benefit of the indigent children of its Protestant schools" will be construed to refer to the public schools, and the word "Protestant" will be rejected as surplusage or supplanted by the word "public."[22] Where a will, written by testator himself, showed various omissions, a gift for an endowment fund "for worthy student" to be selected by the board of an existing college is not void because it is given to a single unidentified student, but will be construed to refer to students, the letter "s" having been left out unintentionally by the testator.[23] Where a will provides that a trust fund is not to be paid to the charity until a certain contract is let

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[16] 1886, Beardsley v. Bridgeport, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152.

[17] 1916, **In re** Hartung, 40 Nev. 262, 160 Pac. 782. For a converse case holding that a bequest to charitable societies "at Philadelphia" will not be extended to such societies in the suburbs of the city, see 1836, **In re** Blenon, 2 Pa. Law J. 250, 256, Brightly N. P. 338.

[18] 1920, Smith v. Heyward, 115 S. C. 145, 104 S. E. 473, 476.

[19] 1910, Princeton University v. Wilson, 78 N. J. Eq. 1, 78 Atl. 393.

[20] 1889, Eastman v. Allard, 149 Mass. 154, 21 N. E. 235.

[21] 1836, **In re** Blenon, 2 Pa. Law J. 250, 253, Brightly N. P. 338.

[22] 1915, Peaslee v. Rounds, 77 N. H. 544, 94 Atl. 263.

[23] 1922, Alstork v. Curry, 207 Ala. 135, 91 So. 796.

or a site is purchased, all that is necessary is that a site be purchased as the condition is in the disjunctive.[1] A will covering real estate and directing that it "be turned over" to a certain organization "to constitute a fund," the interest of which only is to be used, authorizes the sale of the real estate.[2] The words "orphan asylums and institutions wherein orphans are cared for" have been held to cover institutions which merely aid orphans.[3] A gift "toward the building of an Episcopal church in the highlands, which shall be an independent church," has been applied to an independent Episcopal society which has erected a temporary structure.[4] Under a gift to trustees for a hospital, the trustees have been authorized by the court to give a mortgage on the property in order to raise the money necessary for its best interest.[5] Under a conveyance to a school district "for the sole purpose of supporting a school in said district," a portion of the timber from the lot may be taken for the purpose of repairing the schoolhouse on it.[6]

§ 581. **Ambiguity. Generally.** It is unfortunate that donors are oftentimes very careless in designating the institutions by which they wish their charity to be administered. Charity is the object present in their mind; the corporate or associate name of the society which is to execute it is not so likely to be thought of, or if thought of, to be correctly stated.[7] It certainly is very desirable that they take more precaution as to the mode and manner of effectuating their designs.[8] The consequence of a loose designation of beneficiaries is uncertainty as to the intentions of the donor with its inevitable train of bitter litigation. Since a gift intended for only one beneficiary cannot be divided among two institutions which come more or less within the description but

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1 1922, In re Secrest Estate, —— Neb. ——, 191 N. W. 663.

2 1923, Goldberg v. Home Mission, 197 Ky. 724, 248 S. W. 219.

3 1907, Jacoby's Estate, 34 Pa. Super. Ct. 355.

4 1917, Taber v. St. Peter's Parish, 228 Mass. 312, 117 N. E. 339.

5 1901, Ellenherst v. Pythian, 110 Ky. 923, 63 S. W. 37, 23 Ky. Law Rep. 354.

6 1857, Chapin v. School District, 35 N. H. 445, 452.

7 1844, Hornbeck v. American Bible Society, 2 Sandf. Ch. 133 (N. Y.).

8 1858, Beall v. Drane, 25 Ga. 430, 443.

must be appropriated to one only,[9] an almost infinite number of cases involving the validity of testamentary gifts in which the devisee is inaccurately named or described can be found. They generally, though not always, arise out of conflicting claims to the same gift by two or more claimants. Each must be determined on its own peculiar facts, the object being to ascertain and give effect to testator's intention consistent with the rules of evidence.[10] It is not to be expected that cases will ever be found in which the facts will be precisely similar.[11] The underlying principle that the actual intention of the donor as to the donee must be gathered from the face of the will in the light of all the circumstances which surrounded him, and must be gratified, if this can be done consistent with the rules of law, must, therefore, be resorted to, while the applications that have been made of such principle in decided cases can be of service only as illustrations.[12] Such a liberal principle of construction gives such latitude to judicial discretion, and depends for its application so much upon the impressions made by different cases on different judges, that there is even an apparent conflict in the decisions.[13]

§ 582. **Ambiguity. Examples.** It will not be difficult to illustrate the situation. A bequest to "The Omro and Algoma Union Cemetery Association" has been held to be intended for "The Union Cemetery" where testator and his relatives were buried, rather than for the "Omro Cemetery Association," another corporation.[14] A gift by a non-member to the "German Lutheran Church" has been held to be intended for the "German Evangelical Peace Association" and not to the "German Evangelical Lutheran St. John's Church."[15] A legacy "to the sailors' home in Boston has

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[9] 1886, Appeal of Washington and Lee University, 111 Pa. 572, 3 Atl. 664.

[10] 1890, Woman's Union Missionary Society v. Mead, 131 Ill. 338, 367, 23 N. E. 603.

[11] 1844, South Newmarket Methodist Seminary v. Peasley, 15 N. H. 317, 328.

[12] 1901, Woman's Foreign Missionary Society v. Mitchell, 93 Md. 199, 203, 48 Atl. 737, 53 L. R. A. 711.

[13] 1858, Tappan v. Deblois, 45 Me. 122, 128; 1868, Attorney General v. Moore, 19 N. J. Eq. (4 C. E. Green) 503, 515 (Affirming 18 N. J. Eq. (3 C. E. Green) 256). See 1908, In re Nilson, 81 Neb. 809, 822, 116 N. W. 971.

[14] 1886, Webster v. Morris, 66 Wis. 366, 379, 28 N. W. 353, 57 Am. Rep. 278.

[15] 1918, In re Stuart, 184 Iowa 165, 168 N. W. 779.

been construed to refer to the "Boston Ladies' Bethel Society" which maintained such a home and was known to the testator, rather than to the "National Sailors' Home" of which he knew nothing.[16] A gift to the "New York Blind Asylum" has been given to the "New York Institution for the Blind" and not to the "Society for the Relief of the Destitute Blind in the City of New York."[17] A donation to the American Home Mission Tract Society has been held to refer to the American Tract Society and not to the American Home Missionary Society.[18] A bequest to the Massachusetts Hospital for Diseased and Wounded Soldiers has been held to be intended for the "Massachusetts General Hospital" rather than to the "Discharged Soldiers' Home."[19] A gift by a white person to the "New Bedford Home for Aged People" has been awarded to the "Association for Relief of Aged Women in New Bedford" which only **provided** homes for its beneficiaries, and not to the "New Bedford Home for Aged," an institution for colored people.[20] Where the testator had lived in Jerusalem and had been a patient in the Bicur Cholim Hospital, and where he had no knowledge of two other Jewish hospitals founded there since his removal from the city, a gift to the Jewish Hospital at Jerusalem has been construed to refer to the Bicur Cholim Hospital. Where the donor was dominated by no narrow sectarian feelings, a legacy to the "Jewish Hospital for Consumptives" has been construed to refer to the National Jewish Hospital for Consumptives and not to the Jewish Consumptive Relief Society, though the latter was controlled by Jews of the orthodox belief to which the testator belonged, while the former was dominated by Jews of the reformed faith.[1]

§ 583. **Patent and Latent Ambiguities.** A most important inquiry in this connection is whether the ambiguity is patent or latent. A patent ambiguity arises where the lan-

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[16] 1892, Faulkner v. National Sailor's Home, 155 Mass. 458, 29 N. E. 645.

[17] 1888, Wetmore v. New York Institution for Blind, 3 N. Y. Supp. 179, 186, 18 N. Y. St. Rep. 732 (Modified 9 N. Y. Supp. 753, 56 Hun. 313, 31 N. Y. St. Rep. 334).

[18] 1851, Button v. American Tract Society, 23 Vt. 336, 347.

[19] 1911, Mason v. Massachusetts General Hospital, 207 Mass. 419, 93 N. E. 637.

[20] 1920, Kingman v. New Bedford Home, 237 Mass. 323, 129 N. E. 449.

[1] 1914, National Jewish Hospital v. Coleman, 191 Ala. 150, 156, 67 So. 699.

guage used is so equivocal, defective, obscure, uncertain, contradictory, or insensible as to be unintelligible.[2] A latent ambiguity arises where such language is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice between two or more possible meanings, and thus "breeds the ambiguity."[3] A patent ambiguity furnishes no key to the meaning of the testator and leaves the court no choice but to hold the gift to be void. A latent ambiguity makes the ascertainment of the donor's intention possible by considering the words which he has used in connection with the circumstances under which they were uttered. A patent ambiguity, therefore, raises a question of construction under which the meaning of the instrument must depend upon what it says, while a latent ambiguity raises a question of identity, a fitting of the description to a person or thing which can only be accomplished by evidence **dehors.** It follows that in the case of a patent ambiguity the instrument speaks for itself and outside evidence is inadmissible, while in the case of a latent ambiguity such evidence is not only competent but necessary.[4] In the one case, the difficulty is in regard to the words of the instrument themselves. In the other, it is in relation to their application to persons or things which are outside of its four corners. In the first, nothing can be done to carry the intention of the donor into effect. In the second, it can be determined which of two or more persons or things, each answering the words of the will, is intended by the testator.[5] A patent ambiguity arises out of the instrument itself and is incurable. A latent ambiguity arises from extrinsic evidence and may be removed by the same instrumentality.[6] "A bequest or devise will not fail because of a mere inaccuracy in the designation

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[2] 1842, Brewster v. McCall, 15 Conn. 274, 291, 292. A gift to "the orthodox protestant clergymen of Delphi and their successors," there being no such body incorporated or merely organized as a voluntary association, creates a patent ambiguity. 1871, Grimes v. Harmon, 35 Ind. 198, 208, 9 Am. Rep. 690.

[3] 1844, South Newmarket Methodist Seminary v. Peasley, 15 N. H. 317, 327.

[4] 1852, North Carolina Institute v. Norwood, 45 N. C. (Bush Eq.) 65, 68.

[5] 1883, Fairfield v. Lawson, 50 Conn. 501, 510, 47 Am. Rep. 669.

[6] 1842, Brewster v. McCall, 15 Conn. 274, 294.

of the beneficiary, where the meaning of the testator can be gathered with reasonable certainty from the instrument itself, or where the identity of the object of his bounty can be shown by extrinsic evidence; and such evidence is always admissible for the purpose of identifying the beneficiary, where there is uncertainty or ambiguity in the designation."[7] Such latent ambiguity may exist as well when a person or thing is known by two names, as when two persons or things are known by the same name.[8] "Where the name of the beneficiary, as expressed in the will, is applicable in a general way to several different charities, but precisely to none of them, the latent ambiguity may be explained, and parol evidence is admissible to determine which of the charities is intended."[9] It has, therefore, been held that gifts for the benefit of the children of "Gass School District,"[10] or to "Tuberculosis Sanitarium" in a certain county,[11] create latent ambiguities. In construing the language of a testator, his connections in life are important as giving a meaning to his words.[12] A gift to Harrison Township will, where there are twenty-two such townships in the state, be construed to refer to the Harrison Township in which the testator resided.[13] Bequests to the Catholic, Baptist, Presbyterian and Methodist churches will be construed to refer to the churches of such denomination in testator's place of residence.[14] A finding once made will be regarded as one of fact, and will not be disturbed unless palpable error is shown.[15]

§ 584. **Mistake of Law or Fact.** No ambiguity will arise where the words of the testator are clear, even though they have been prompted by a mistake of law or fact. "Although one of the fundamental canons of interpretation requires courts to discover and be led by the intention of the maker

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[7] 1906, McDonald v. Shaw, 81 Ark. 235, 240, 98 S. W. 952.

[8] 1852, North Carolina Institute v. Norwood, 45 N. C. (Busb Eq.) 65, 73.

[9] 1914, National Jewish Hospital v. Coleman, 191 Ala. 150, 153, 67 So. 699.

[10] 1855, Gass v. Ross, 35 Tenn. (3 Sneed.) 211.

[11] 1920, In re Wilson, 111 Wash. 491, 191 Pac. 615.

[12] 1842, Brewster v. McCall, 15 Conn. 274, 295.

[13] 1888, Skinner v. Harrison, 116 Ind. 139, 141, 142, 18 N. E. 529, 2 L. R. A. 137.

[14] 1846, Catholic Church in Taylorville v. Offcutt, 45 Ky. (6 B. Mon.) 535.

[15] 1892, Pepper's Estate, 11 Pa. Co. Ct. Rep. 257, 261, 1 Pa. Dist. Rep. 148 (Affirmed 154 Pa. 331, 25 Atl. 1058).

of an instrument, that intention in the case of a testator is judicially determined to be simply what he has written, if his language be clear and precise and the person or thing exist and be accurately named."[16] The intent in such case must be drawn from the will, not the will from the intent. Its words will control if they apply with exactness to one person, though parol evidence would make it perfectly clear that another person less exactly described was intended.[17] "When a man deliberately puts his intention in writing under testamentary safeguards, and carefully preserves that writing for the guidance of those who represent him after his death, courts regard it as revealing his thoughts and intents with more accuracy than would any parol declarations which extrinsic evidence could substitute for it."[18] A gift to an unincorporated Seaman's Aid Society will, therefore, not be turned over to an incorporated "Seaman's Friend Society," though the name of the beneficiary is inserted by mistake in consequence of misleading information given to the testator by the scrivener who drew up the will, and though it appears from the donor's previous acts and declarations and, a great variety of collateral circumstances, that he actually had the Seaman's Friend Society in mind.[19] A gift for the benefit of the library of the commercial association of Pendleton will not be given to the public library of Pendleton so long as the association has a library, no matter how weak it may be.[20]

§ 585. **Latent Ambiguity favored.** It is but natural that courts, in the case of charitable gifts, should lean strongly toward holding ambiguities to be latent rather than patent. The only case in which a contrary tendency was markedly present[21] has, therefore, been quickly overruled.[22] Gifts will not be held to be void for uncertainty as to the legatee except

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[16] 1877, Dunham v. Averill, 45 Conn. 61, 67, 29 Am. Rep. 642.

[17] 1883, Fairfield v. Lawson, 50 Conn. 501, 509, 47 Am. Rep. 669.

[18] 1877, Dunham v. Averill, 45 Conn. 61, 68, 29 Am. Rep. 642.

[19] 1843, Tucker v. Seaman's Aid Society, 48 Mass. (7 Met.) 188, 199. See 1860, Appeal of Evangelical Ass'n, 35 Pa. 316, 319. See also 1894, Jeanes Estate, 34 Wkly. Notes Cas. 190, 3 Pa. Dist. Rep. 314 (Pa.).

[20] 1920, Hartman v. Pendleton, 96 Or. 503, 186 Pac. 572.

[21] 1851, Taylor v. American Bible Society, 42 N. C. (7 Ired. Eq.) 201.

[22] 1852, North Carolina Institute v. Norwood, 45 N. C. (Busb. Eq.) 65.

where it is found to be impossible, either from the words used alone, or in connection with the circumstances under which they were uttered, to determine with reasonable certainty the person or corporation intended.[23] Corporations described in a will as its beneficiaries may, therefore, prove their corporate existence, their objects and purposes, the name or names under which they are known, the non-existence of other similar bodies at the time of the making of the will, and the testator's family, church and social relations, as well as his knowledge of, feeling toward, and relation with them.[24] Parol evidence is admissible for such purposes,[1] but must be ancillary to a correct understanding of the language of the will.[2] All direct evidence of intention, as contra-distinguished from evidence to show the meaning of the words of the will, is inadmissible.[3] Even though the beneficiary is designated by an erroneous name, evidence to identify him is admissible.[4] Evidence that the donor preferred one of the societies claiming a charitable gift under a description which would be equally applicable to another is admissible.[5]

§ 586. **Description of Beneficiary.** The beneficiary need not necessarily be named, but may be described.[6] All that is necessary is that his description is by words that are sufficient to denote him and distinguish him from others. If no one can mistake who is intended, the gift is not indefinite.[7] "A characteristic and contra-distinctive definition or description may often identify the object even better than the arbitrary and isolated name of it."[8] A corporation may,

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[23] 1873, St. Luke's Home v. Indigent Female Ass'n, 52 N. Y. 191, 11 Am. Rep. 697.

[24] 1890, Woman's Union Missionary Society v. Mead, 131 Ill. 388, 362, 23 N. E. 603.

[1] 1880, Carleton v. Roberts, 1 Posey Unreported Cas. 587, 594 (Tex.).

[2] 1883, Fairfield v. Lawson, 50 Conn. 501, 510, 47 Am. Rep. 669. But see 1914, National Jewish Hospital v. Coleman, 191 Ala. 150, 154, 67 So. 699.

[3] 1917, Schneider v. Kloepple, 270 Mo. 389, 398, 193 S. W. 834, 837.

[4] 1851, Button v. American Tract Society, 23 Bt. 336, 349.

[5] 1888, Hazeltine v. Vose, 80 Me. 374, 380, 14 Atl. 733; 1895, Trim v. Brightman, 168 Pa. 395, 31 Atl. 1071.

[6] 1842, Brewster v. McCall, 15 Conn. 274, 293.

[7] 1921, Giblin v. Giblin, 173 Wis. 632, 182 N. W. 357.

[8] 1867, Cromie v. Louisville Orphan's Home Society, 66 Ky. (3 Bush.) 365, 378.

therefore, take as well "by description, as by name,"[9] and such description is sufficient if it enables the court to ascertain and know the legatee.[10] "A devise is never to be construed to be absolutely void for uncertainty but from necessity. If it be possible to reduce it to a certainty, the devise is to be sustained."[11] A legacy to the Foundling Asylum for Babies, Lexington Ave. and 68th Street, New York, has, therefore, been construed as being intended for the Foundling Asylum of the Sisters of Charity in the City of New York.[12] A bequest "unto the trustees of the institution for the maintenance and instruction of the indigent blind in the City of New York" has been decreed to be paid to the "New York Institution for the Blind."[13] A donation to "any institution in Philadelphia that will give shelter to homeless people at night, irrespective of creed, color, or condition," has been awarded to the "Philadelphia Society for Organized Charity," the only body coming within the description.[14] A gift "to the trustees of the Presbyterian Home for Old Ladies, situated in Richmond, Va.," has been construed as being intended for the "Richmond Home for Ladies."[15] A legacy to the "Episcopal Society in Hamden" has been awarded to "Grace Church" which was the only Episcopal church in Hamden.[16] A bequest "to the Society for the Aged and Infirm in Newport" has been held to refer to the "Townsend Aid for the Aged" in such city.[17] A gift to the M. E. church, of which testator's wife should die a member, has been upheld, though the beneficiary was necessarily uncertain until such death occurred.[18] A bequest to the "Baptist Missionary Union of Foreign Missions" has

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[9] 1845, American Bible Society v. Wetmore, 17 Conn. 181, 186.

[10] 1885, Shipman v. Rollins, 98 N. Y. 311, 15 Abb. N. C. 288, 297.

[11] 1842, Brewster v. McCall, 15 Conn. 274, 292, 293.

[12] 1882, Effray v. Foundling Asylum, 5 Redf. Sur. 557 (N. Y.).

[13] 1854, New York Institution for the Blind v. How, 10 N. Y. (6 Seld.) 84.

[14] 1894, In re Croxall, 162 Pa. 579, 29 Atl. 759.

[15] 1907, Jordan v. Richmond Home for Ladies, 106 Va. 710, 715, 56 S. E. 730.

[16] 1870, Jacobs v. Bradley, 36 Conn. 365, 369.

[17] 1884, Pell v. Mercer, 14 R. I. 412, 447.

[18] 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 1 Rich. Law 176 note (S. C.).

been held to be intended for the "American Baptist Foreign Missionary Society."[19]

§ 587. **Gifts in Ease.** A gift is frequently given to an institution which is merely the instrument through which a charitable corporation dispenses its benefactions. The law in such cases regards the substance of the gift and, in favor of a charity, vests it in the party capable of taking it, in whose ease it was given.[20] "When the object designated by the donor is incapable of taking directly, the law assures the gift to a superior party which is capable, if the gift be intended in ease of that party."[1] The legal incapacity of an unincorporated children's home, itself a mere agent of a corporation, to take a charitable gift is, therefore, not fatal to its validity.[2] A legacy to "the missions and schools of the Episcopal Church to be established at or near Port Cresson" (in Africa) has, therefore, been awarded to the corporation which conducts these missions.[3] A donation to the unincorporated men's club of an incorporated church has been awarded to the church.[4] A bequest to the "German Turner Home, Jersey City," has been construed as being intended for the "German Pioneer Verein," the owner of such home.[5] A gift to the "Presbyterian Orphan Asylum of Louisville" has been held to be intended for the Louisville Orphans' Home Society.[6] A donation to "St. Francis Hospital" has been construed to be intended for "The Sisters

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[19] 1911, Giddings v. Gillingham, 108 Me. 512, 81 Atl. 951.

[20] 1858, Appeal of Domestic and Foreign Missionary Society, 30 Pa. (6 Casey) 425, 436; 1827, McGirr v. Aaron, 1 Pen. and W. 49, 21 Am. Dec. 361 (Pa.); 1870, Appeal of Yard, 64 Pa. 95, 99. But see 1817, Lockwood v. Weed, 2 Conn. 287. In New York a gift to an unincorporated branch of a corporation has been given to the corporation with a "moral duty" to devote it to the purposes of the branch. 1920, In re Cameron's Estate, 184 N. Y. Supp. 540, 113 Misc. 416.

[1] 1860, Appeal of Evangelical Ass'n, 35 Pa. (11 Casey) 316, 319.

[2] 1916, Eccles v. Rhode Island Trust Co., 90 Conn. 592, 98 Atl. 129, 131.

[3] 1858, Appeal of Domestic and Foreign Missionary Society, 30 Pa. (6 Casey) 425, 433.

[4] 1920, In re Allen, 181 N. Y. Supp. 398, 111 Misc. 93.

[5] 1907, German Pioneer Verein v. Meyers, 72, N. J. Eq. 954, 67 Atl. 23 (Affirming 70 N. J. Eq. 192, 63 Atl. 835).

[6] 1867, Cromie v. Louisville Orphans' Home Society, 66 Ky. (3 Bush.) 365, 376. For a similar case see 1882, Creer v. Belknap, 63 How. Prac. 390 (N. Y.). But see 1880, First Presbyterian Society v. Bowen, 21 Hun. 389 (N. Y.).

of the Poor of St. Francis."[7] A devise to the "New York Home for the Blind" has been awarded to the "Society for the Relief of the Destitute Blind" in New York.[8] A bequest to a certain fund has been held valid and has been awarded to the corporation which controlled such fund.[9]

§ 588. **Slight Misdescription of Beneficiary.** Any slight misdescription of the beneficiary institution is immaterial,[10] if the donee can be identified by the description actually given.[11] A variation from the strict legal designation, in a devise or conveyance to a corporation for charitable purposes, will not make void the devise or grant, provided the corporation intended can be sufficiently ascertained from the terms used.[12] A gift will not be void because a word has been added to the corporate name of the beneficiary,[13] or because a preposition occurring in such name,[14] or some other word or words in it,[15] have been changed, or because one[16]

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[7] 1907, Johnson v. Hughes, 187 N. Y. 446, 449, 80 N. E. 373.

[8] 1881, Livingston v. Gordon, 7 Abb. N. C. 53 (Affirmed 84 N. Y. 136).

[9] 1914, Wilmington Conference M. E. Church v. Williams, 6 Boyce 52, 96 Atl. 791 (Del.); 1884, Barnum v. Baltimore, 62 Md. 275, 296, 50 Am. Rep. 219; 1911, Pope v. Hinkley, 209 Mass. 323, 329, 95 N. E. 798. See 1906, Kingsbury v. Brandegee, 100 N. Y. Supp. 353, 113 App. Div. 606.

[10] 1900, Trinity Methodist Episcopal Church South v. Baker, 91 Md. 539, 567, 46 Atl. 1020; 1911, Gardner v. McNeal, 117 Md. 27, 32, 82 Atl. 988, Ann. Cas. 1914, A. 119; 1888, University v. Tucker, 31 W. Va. 621, 631, 8 S. E. 410; 1886, Wilson v. Perry, 29 W. Va. 169, 197, 1 S. E. 302.

[11] 1884, Pell v. Mercer, 14 R. I. 412, 447.

[12] 1858, Chapin v. School District, 3 Ohio Dec. 321.

[13] 1913, Hall v. Grand Lodge, 55 Ind. App. 324, 328, 103 N. E. 854; 1895, Tichenor v. Brewer, 98 Ky. 349, 33 S. W. 86, 17 Ky. Law Rep. 936; 1899, Congregational Home Missionary Society v. Van Arsdale, 58 N. J. Eq. 293, 42 Atl. 1047 (Affirmed 59 N. J. Eq. 658, 44 Atl. 1099).

[14] 1914, M. E. Hospital v. Williams, 6 Boyce 59, 96 Atl. 794 (Del.).

[15] 1844, Ayers v. Weed, 16 Conn. 291. 1891, Kimball v. Chappel, 18 N. Y. Supp. 30, 32, 27 Abb. N. C. 437; 1886, Webster v. Morris, 66 Wis. 366, 380, 28 N. W. 353, 57 Am. Rep. 278; 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 363.

[16] 1883, Preachers' Aid Society v. England, 106 Ill. 125; 1899, Congregational Home Missionary Society v. Van Arsdale, 58 N. J. Eq. 293, 42 Atl. 1047 (Affirmed 59 N. J. Eq. 658, 44 Atl. 1099); 1878, De Camp v. Dobbins, 31 N. J. Eq. (4 Stew.) 671 (Affirming 29 N. J. Eq. (2 Stew.) 36, 38, 39); 1858, Cresson's Appeal, 30 Pa. (6 Casey) 437, 451; 1851, Dickson v. Montgomery, 31 Tenn. (1 Swan.) 348, 369; 1887, Vermont Baptist State Convention v. Ladd, 59 Vt. 5, 9 Atl. 1.

or more[17] words have been omitted, or because of abbreviations of any such words.[18] While a beneficiary cannot be inserted in a will where there is merely a blank, and while a wrong name inserted by the donor cannot be corrected, a corporation beneficiary may be imperfectly described by another than its corporate name, and this will not be fatal so long as it is sufficiently indicated to be discoverable.[19] Where, therefore, either a corporation or a natural person is so identified by the name used in the will, as applied to the facts and circumstances, as to distinguish such person or corporation from all others, such person or corporation takes the gift, in the same manner as if no such discrepancy had appeared.[20]

§ 589. **Abbreviated or Popular Name.** The technical names adopted by charitable foundations are frequently so long that an abbreviation of them becomes almost a necessity. Such abbreviation is sometimes adopted even by the charity itself in its letterheads, or signboards, or subscription blanks. Such popular names, therefore, are frequently used by testators. To hold such gifts void for this reason would not be exercising common sense. In this age of progress when everything is made short, it would be ground for special regret if a charity were defeated because the donor had applied a short name to the subject of his bounty.[1] Corporations may, therefore, be designated by their popular name[2] just as an individual may be designated by a nickname.[3] An orphanage has, therefore, been allowed to take a gift under the name, "the nursery."[4] The "Annual Alabama Conference of the Methodist Episcopal Church South" has taken under the designation "Alabama Methodist Conference South."[5] The

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[17] 1886, King v. Grant, 55 Conn. 166, 170, 10 Atl. 505; 1844, Hornbeck v. American Bible Society, 2 Sandf. Ch. 133 (N. Y.).

[18] 1844, Hornbeck v. American Bible Society, **supra.**

[19] 1875, Lefevre v. Lefevre, 59 N. Y. 434, 441.

[20] 1844, Minot v. Boston Asylum, 48 Mass. (7 Met.) 416, 418.

[1] 1852, North Carolina Institute v. Norwood, 45 N. C. (Busb. Eq.) 65, 74.

[2] 1904, Colbert v. Speer, 24 App. D. C. 187 (Affirmed 200 U. S. 130, 26 S. Ct. 201, 50 L. Ed. 403).

[3] 1852, North Carolina Institute v. Norwood, 45 N. C. (Busb. Eq.) 65, 71.

[4] 1889, Wood v. Hammond, 16 R. I. 98, 113, 17 Atl. 324, 18 L. R. A. 198.

[5] 1868, Alabama Conference M. E. Church South v. Price, 42 Ala. 39, 50.

"Trustees of the Diocesan Missionary Society of Virginia" have been beneficiaries under the name "Diocesan Missionary Society."[6] The "Trustees of the Parochial Fund of the Protestant Episcopal Church in the Diocese of Western New York" have taken under the name "Diocese of Central New York."[7] The "Union Association of the Children's Home of Burlington County" has taken under the designation "Children's Home of Mount Holly."[8] The "Trustees of the Theological Seminary of the Presbyterian Church" have taken a gift to the "Theological Seminary at Princeton."[9] The "Trustees of the East Maine Conference of the Methodist Episcopal Church" have been allowed to take under the name "Methodist Episcopal Society of Maine."[10]

§ 590. **Geographical Mistake.** A donor sometimes is wrongly informed concerning the geographical location of his intended beneficiary, and in consequence injects actual error into his description. Even this will not make his gift void, if the beneficiary, notwithstanding the mistake, can be identified. Where no "Franklin Seminary of Literature and Science, Newmarket, N. H.," is in existence, a bequest to such an institution creates a latent ambiguity and parol evidence may be admitted to show that "The Trustees of the South Newmarket Methodist Seminary" were intended by the testator.[11] A bequest to "Woodstock College in Howard County, Md.," will be paid to the institution of that name in Baltimore County, where such college is the only one by that name in the state.[12] A legacy to "the Methodist Episcopal Mission at Bombay" has been construed to be made to the "Missionary Society of the Methodist Church" for its work in India, though such church had no mission at Bombay, its missionaries merely passing through Bombay on their way to their post at Lucknow.[13]

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[6] 1878, Brown v. Thompkins, 49 Md. 423, 431.

[7] 1906, Kingsbury v. Brandegee, 100 N. Y. Supp. 353, 113 App. Div. 606.

[8] 1878, Goodell v. Union Ass'n of Children's Home, 29 N. J. Eq. (2 Stew.) 32, 34.

[9] 1855, Newell's Appeal, 24 Pa. (12 Harris) 197, 199.

[10] 1877, Straw v. East Maine Conference of M. E. Church, 67 Me. 493.

[11] 1844, South Newmarket Methodist Seminary v. Peasley, 15 N. H. 317.

[12] 1900, Kerrigan v. Connelly, 46 Atl. 227, 229 (N. J.); 1899, In re Fitzsimmons, 62 N. Y. Supp. 1009, 29 Misc. 731.

[13] 1873, McAllister v. McAllister, 46 Vt. 272, 283.

§ 591. **Legislative Favor.** It will not be well to close this chapter without some reference to the favors bestowed on charities by the legislative branch of the government. The exemption from taxation and damage liability accorded to charitable foundations is well known and need not be further elaborated at this place.[14] A striking and far less known illustration of such favor is furnished by an early Connecticut statute, which permitted charitable corporations to subscribe to certain bank stock at a fixed price independent of the market value.[15] Such extraordinarily favorable action by the legislature cannot but have a decided influence on the courts.

§ 592. **Summary.** Charitable trusts are regarded by equity with peculiar favor and are, therefore, liberally construed with a view to uphold them. If a gift comes within the legal purview of a charity and is not contrary to any rule of law, the intention of the donor will be carried out if it can be ascertained, no matter how inartificially and even bunglingly it has been expressed. Between two possible constructions of a provision in a will or other instrument, one of which will uphold while the other will defeat the intended donation, the first will invariably be selected by the courts. While a charity will fall to the ground where the description of the proposed beneficiary is such that he cannot be identified (patent ambiguity), a mere doubt as to which of two institutions is intended by a popular name, or by a description, or by a name which is longer or shorter than the proper name of such intended beneficiary, or a designation which contains some erroneous geographical notions or points to an agency rather than to the principal (latent ambiguity), will not be fatal, but will be subject to explanation by extrinsic evidence. In doubtful cases the inclination of the courts will be to hold an ambiguity to be latent and explainable rather than patent and fatal.

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[14] See Chapters 18 and 19, infra.

[15] 1822, American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; 1829, Bishop's Fund v. Eagle Bank, 7 Conn. 476.

CHAPTER XV

SUPERVISION

§ 603. **Visitorial Power. Generally.** The law, in the foundation of a charity, distinguishes between the **foundatio incipiens,** the granting of the charter by the state, and the **foundatio perficiens,** the donation of funds by individuals.[1] Such individuals ordinarily will have sufficient standing in the courts to enforce a faithful execution of the charity created by them,[2] and may restrain the diversion of the property from its charitable uses.[3] "An individual who conveys property in trust for charitable purposes has, unless he should assign it to another, what is called the visitorial power, in the exercise of which he may prescribe rules for its management and for the administration of the trust, and may govern and control the trustees, inspect their proceedings, and correct abuses in their conduct."[4] Provided that he is, in fact, a charitable donor and not merely a grantor for a full consideration,[5] he has a right, in the first instance, by such directions as he may then make, or as he reserves the power to make within the limits of such reserved power, to direct how and in what mode his charity shall be administered, and to see that his will and purpose in creating the charity are observed and carried into effect.[6] Where he gives the power of removal of trustees to the directors and first members of a church (both numerous bodies), he does not appoint particular persons, but merely designates two classes in whom the power is to vest and survive, no matter who the

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[1] 1894, Union Baptist Association v. Hunn, 7 Tex. Civ. App. 249, 252, 26 S. W. 755.

[2] 1911, Tate v. Woodyard, 145 Ky. 613, 615, 140 S. W. 1044; 1900, Associate Alumni v. General Theological Seminary, 163 N. Y. 417, 422, 57 N. E. 626, modifying 49 N. Y. Supp. 745, 26 App. Div. 144.

[3] 1896, Mills v. Davison, 54 N. J. Eq. 659, 667, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594.

[4] 1894, Union Baptist Ass'n v. Hunn, **supra.**

[5] 1850, Kerlin v. Campbell, 15 Pa. (3 Harris) 500.

[6] 1848, Nelson v. Cushing, 56 Mass. (2 Cush.) 519, 530. Such a trust cannot be revoked or modified unless the donor has expressly reserved the power to do so. 1921, Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852.

individuals may be.[7] This power naturally vests in the state where the state is the only donor,[8] and may be created without any particular formality and without any technical or precise form of words.[9] It is not a power to revoke the gift, or change its use or divest the rights of its beneficiaries, but is a mere authority to arrest and control abuses and enforce the due observance of the charity,[10] and can be employed effectually to prevent trustees from frittering away the trust property by connivance or neglect, by improvidence or maladversion.[11] At common law, it was a property right and arose by implication from the gift, or might be vested by the donor in his appointee.[12] It is the counterpart of the board of directors in a private corporation.[13]

§ 604. **Visitorial Power vested in Corporations.** The question whether testamentary appointees are visitors, depends upon the nature of the powers delegated to them by the founder of the charity, rather than on the name by which they are called in the instrument of foundation.[14] The customary method by which to accomplish this result is by the creation of a corporation for the purpose of the charity under

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[7] 1921, Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852, 861.

[8] 1901, Koblitz v. Western Reserve University, 21 Ohio Cir. Ct. Rep. 144, 150, 11 Ohio C. Dec. 515. Thus, the fact that the "stock" in a hospital corporation is given to six named churches "for their own respective uses and benefit, and without any charge or trust reserved to my estate," and that the continuance of the hospital is expressly declared not to be binding, makes these churches visitors, but does not give them the beneficial ownership of the shares and the right to dissolve the corporation and distribute its property among themselves. 1923, Weme v. First Church of Christ Scientist, —— Or. ——, 219 Pac. 618.

[9] 1833, Allen v. McKean, Fed. Cas. No. 229, Page 498, 1 Sumn. 276; 1865, Drury v. Natick, 92 Mass. (10 Allen) 169, 175.

[10] 1833, Allen v. McKean, **supra.**

[11] 1875, **In re** Taylor Orphan Asylum, 36 Wis. 534, 548.

[12] 1914, State v. Vanderbilt University, 129 Tenn. 279, 342, 164 S. W. 1151. Such a property right is not recognized in America. Contributors to a charity "have no property interest in the fund, or the real estate purchased with the fund, and no rights whatever in relation thereto, except to compel the administration of the trust in accordance with the terms of the gift." 1917, O'Brian v. Physicians' Hospital Ass'n, 96 Ohio St. 1, 7, 116 N. E. 975, L. R. A. 1917, F. 741.

[13] 1869, State v. Adams, 44 Mo. 570, 578.

[14] 1865, Drury v. Natick, **supra.**

a charter which confers on its officers the full power of the management of its property.[15] Under such a charter the officers of the corporation will unite with their other powers the power of visitation. However, the chartering of such a corporation is not necessarily a delegation to it of this power, which on the contrary may be reserved by the donor to himself or his heirs, or may be confided to some other person. "Every founder of an eleemosynary corporation (that is, the founder **perficiens,** or person, who originally gives to its funds and revenues), and his heirs, have a right to visit, inquire into, and correct all irregularities and abuses, which may arise in the course of the administration of its funds, unless he has conferred, as he has the right to, the power upon some other person."[16] Such a visitor, however, has no power to act in a proceeding by a third person against the corporation, but is confined to offenses against the private laws of the corporation itself.[17] He has "the power and duty to hear and determine all differences of the company among themselves, and generally to superintend the internal government of the body, taking as a guide the rules laid down by the founder, and so long as he does not exceed his province, his decision is final."[18]

§ 605. **Subscribers to a Fund. Visitorial Power.** What has just been said applies to donations by single individuals, but breaks down completely where the fund in question is raised by subscription or other similar process, since in such a case there would not be one, but perhaps thousands, or even millions of persons, all equally entitled to exercise this right. Where, therefore, a charitable fund is raised by numerous donations, monthly dues, fairs, entertainments, and such other means as are frequently used to appeal to the charitable instincts of a generous and prosperous people, per-

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[15] 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 218; 1894, Union Baptist Ass'n v. Hunn, 7 Tex. Civ. App. 249, 252, 26 S. W. 755.

[16] 1833, Allen v. McKean, Fed. Cas. No. 229, page 497, 1 Sumn. 276.

[17] 1901, Koblitz v. Western Reserve University, 21 Ohio Cir. Ct. Rep. 144, 151, 11 Ohio C. Dec. 515.

[18] 1879, Attorney General v. Parker, 126 Mass. 216, 220. But see 1853, Williams v. First Presbyterian Society, 1 Ohio St. 478 holding that there is no visitorial power in a dedicator.

sons who have thus contributed have no visitorial power,[19] and are not proper parties plaintiff to enforce the trust.[20] There must be something peculiar in a subscription to give a contributor to a charitable fund a foothold in the courts for the purpose of questioning the disposition of the fund.[21] Ordinarily, "where contributors have subscribed to a fund for a charitable purpose, and have paid it over to the hand by which it is to be received and applied, their interest in and control over it cease and determine, and whatever jurisdiction is thereafter entertained by the courts, with respect to the disposition and control of this fund, must be called into active exercise either by the attorney general, acting upon behalf of the public, or by the trustees charged with its custody and administration, or by some person having a beneficial interest in the object of the trust."[22] Where, however, contributors to a charitable fund are also beneficiaries of it, they have a standing in the courts to question its disposition.[1]

§ 606. **Heirs of Donor as Visitors.** The visitorial power also usually breaks down where it is, without express reservation, sought to be applied in such a way as to make the heirs of the donor the visitors of his charity. Not only may these heirs be very numerous, but they very frequently are bitterly opposed to the creation of the charity and in a great many cases have fought it to the extent of their powers. They are, therefore, about the most unfit persons to act as visitors. No implication will hence be indulged in in their favor. On the contrary, the courts will, if possible, construe the trust in such a manner as to result in the appointment by implication of some other person as visitor, and will apply the rule that when the founder has appointed a general visitor, and for some cause the latter's functions have been suspended, the power of visitation does not, **ipso facto,** return to the donor or his heirs, but is exercised through the courts

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[19] 1890, Tyree v. Bingham, 100 Mo. 451, 464, 13 S. W. 952.

[20] 1921, Freedman's Aid and Southern Education Society v. Scott, 125 Miss. 299, 87 So. 659.

[21] 1857, Ludham v. Higbee, 11 N. J. Eq. (3 Stockt.) 342, 347.

[22] 1895, Clark v. Oliver, 91 Va. 421, 427, 428, 22 S. E. 175.

[1] 1857, Ludham v. Higbee, 11 N. J. Eq. (3 Stock.) 342, 348.

of the land properly invoked.[2] It is clear that this is more or less the situation in most of the cases that come before the courts. Men do not usually acquire large property holdings until they are well advanced in life. Nor do they, as a rule, contribute largely to charity until they feel that their dissolution is close at hand. In fact, in the great majority of the cases, the donation is made by will and hence becomes effective only after the donor is dead. In the few cases where large donations are made during the donor's lifetime, the trustees will ordinarily conform their action closely to his will, partly out of respect toward him, partly with a view to procuring further gifts, and will thus prevent the question from reaching the courts. In view of this situation, it has been categorically declared by some courts that, where a charitable trust is declared, the heirs lose all interest in the property[3] and all interest in the enforcement of the trust apart from the general public whose rights are represented by the attorney general.[4] It has been said that such property comes under the protection of the law which says that it shall forever remain to such charitable use according to the true intent and meaning of the grantor,[5] which intent will be enforced by the courts.[6] The same has been held concerning residuary legatees,[7] and residuary devisees.[8] Says the United States Supreme Court: "When a charitable trust has been fully constituted, and the funds have passed out of the hands and control of the donors, and into the hands of the proper institution, or organization, intended for its administration, the Court of Chancery, or some analogous jurisdiction, becomes its legal guardian and protector, and will

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[2] 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 681, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[3] 1899, Lackland v. Walker, 151 Mo. 210, 242, 243, 52 S. W. 414; 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 517, 67 C. C. A. 393 (Affirming 126 Fed. 796).

[4] 1908, In re Burnham, 74 N. H. 492, 494, 69 Atl. 720; 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 677, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[5] 1896, Christ Church v. Trustees of Donations and Bequests, 67 Conn. 554, 567, 35 Atl. 552.

[6] 1864, Happy v. Morton, 33 Ill. 398, 407, 408.

[7] 1896, Green v. Blackwell, 35 Atl. 375, 376 (N. J.).

[8] 1909, In re St. Michael's Church, 76 N. J. Eq. 524, 527, 74 Atl. 491.

take care that the objects of the trust are duly pursued, and the funds rightly appropriated.''[9]

§ 607. **State as Visitor.** Many cases must arise where there is no tangible personal visitor. The donor is generally dead, has not expressly appointed any visitor, and his heirs are unfit to act as such. The situation, however, calls loudly for supervision. No personal visitor being available,[10] the state itself must step into the breach and enter into the controversy. The community as a whole is interested in its various charitable ventures. The state, therefore, is a proper party as representing the beneficiaries in such actions.

§ 608. **Courts and Visitorial Power.** The position which the courts occupy in this matter must now be clear. They have as such no visitorial power,[11] but at most a power to hear an appeal from the decision of such visitors.[12] ''When a general visitorial power is provided by the founder of an eleemosynary corporation and foundation for charity, no court of either law or equity will interfere to control or direct the ordinary exercise of such visitorial power, subject to the limitation only, that when the visitors, in the exercise of their power, act contrary to law in a matter amounting in effect to a breach of trust, then a court of equity, under their ordinary jurisdiction, will interpose.''[13]

§ 609. **Power of Courts as Visitors.** But while this is true, the non-existence in most cases of a personal visitor makes the distinction between the inherent power of the court and the visitorial power a merely academic one. Equity has jurisdiction over all charitable trusts. Unless charities can come into some tribunal; unless some court has jurisdiction over them, they are without the pale of the law and at the mercy of any one disposed to despoil them.[14] ''The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the court of morals or the forum of conscience, is no trust at all; it is an ab-

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[9] 1881, Printing House v. Trustees, 104 U. S. 711, 727, 26 L. Ed. 902.

[10] 1894, In re Mercer Home for Disabled Clergymen, 162 Pa. 232, 238, 29 Atl. 731; 1894, Mercer Home for Disabled Clergymen v. Fisher, 162 Pa. 239, 29 Atl. 733.

[11] 1916, In re Norton, 161 N. Y. Supp. 710, 97 Misc. 289.

[12] 1826, In re Murdock, 24 Mass. (7 Pick.) 303.

[13] 1848, Nelson v. Cushing, 56 Mass. (2 Cush.) 519, 530.

[14] 1835, Burr v. Smith, 7 Vt. 241, 284, 29 Am. Dec. 154.

surdity. The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control, to avert its destruction, perversion, or abuse."[15] A provision in a will that the trustee shall not be held accountable for the non-performance or ill-performance of the trust is, therefore, ineffective,[16] and will have to give way to the statute which says that he shall account.[17] "No testator can obtain for his bequests that support and permanence which the law gives to public charities only, and at the same time deprive the beneficiaries and the public of the safeguards which the law provides for their due and lawful administration."[18] Of course, in the absence of allegations of misconduct, mismanagement, etc., no bill for an accounting will lie against trustees.

§ 610. **Power of Courts as Visitors. Continued.** It follows that those who manage public charities are not free to neglect them, even though no personal visitor is in existence.[19] Being public utilities of a very high order, charities "are intimately associated with the state which exercises over them through its courts a watchful supervision, so that their property, funds and revenues shall not be diverted to any improper purpose, and that trustees and agents shall perform the duties assigned to them with honesty and fidelity, and for the best advantage of the charitable uses designated by the donor or donors."[20] Says the Pennsylvania court: "Our courts, in their control over trustees who hold for charitable uses, exercise the broad visitorial and supervisory powers of the Commonwealth."[1] Charities have, therefore, been classed, together with idiots, lunatics and infants, as subjects of equity jurisprudence.[2] The general jurisdiction

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[15] 1888, Mannix v. Purcell, 46 Ohio St. 102, 139, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

[16] 1876, Schmucker v. Reel, 61 Mo. 592.

[17] 1912, Ackerman v. Fichter, 179 Ind. 392, 399, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915, D. 1117.

[18] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 571; 1921, State v. Bank of Commerce and Trust Co., 143 Tenn. 287, 227 S. W. 1029.

[19] 1899, Powers v. Massachusetts Homeopathic Hospital, 101 Fed. 896, 900 (Affirmed 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372).

[20] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 559, 560, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[1] 1918, Toner's Estate, 260 Pa. 49, 54, 103 Atl. 541, 543.

[2] 1846, McCord v. Olchiltre, 8 Blatckf. 15, 19, 21 (Ind.).

of the courts over them has been stated to embrace all questions arising upon legal bequests for charitable purposes,[3] including annual accountings[4] and the prevention of misappropriations and correction of abuses.[5] A fund given to an incorporated church which was being misapplied has even been sequestered by the court until such time as the church should take proper care of it.[6] Where a trust property, worth at least $100,000, was devised for the education of poor orphan children, and had for twenty-three years provided salaries and free tables for a manager and a tutor without aiding a single orphan, the court has intervened and has checked this perversion of the trust for the benefit of its agents.[7] The diversion by a city of property donated to it for an isolation hospital to other purposes has been enjoined.[8]

§ 611. **Limitation of Courts' Power.** This power, of course, is not unlimited, but extends only to such things as the interpretation and enforcement of the provisions of the instrument creating the trust, to supplying defects of conveyance, and to eliminating interpolated conditions,[9] while the question, "Who is to partake of the charity?" depends on the wishes of the private benefactor as expressed when he created the trust.[10] The use of charitable funds in good faith according to the testator's intention will, therefore, not be controlled by the court merely because a moderate sum remains in the hands of the trustees which is not being expended.[11] Neither is it for a court of law "to divest a legal estate, because there may be, at some future time, a failure in the execution of an equitable trust, for which it is uncertain whether there may be any adequate remedy."[12] Neither will such rights be enforced in an action of eject-

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[3] 1856, Elcan v. Lancasterian School, 2 Pat. and H. 53, 64 (Va.).

[4] 1886, State v. Smith, 84 Tenn. (16 Lea) 662, 669.

[5] 1904, Jenkins v. Berry, 119 Ky. 350, 362, 83 S. W. 594, 28 Ky. Law Rep. 1141.

[6] 1902, Van Hoven v. Immanuel Presbyterian Church, 108 La. 274, 278, 32 So. 389.

[7] 1834, **Ex Parte** Cassel, 3 Watts 408, 440, 441 (Pa.).

[8] 1920, Woman's Hospital League v. Paducah, 188 Ky. 604, 233 S. W. 159.

[9] 1871, Price v. School Directors, 58 Ill. 452.

[10] 1913, Connecticut College for Women v. Calvert, 87 Conn. 421, 436, 88 Atl. 633.

[11] 1877, Attorney General v. Butler, 123 Mass. 304.

[12] 1815, Bartlett v. King, 12 Mass. 536, 544, 7 Am. Dec. 99.

ment.[13] While a charitable trust confided to a corporation will be enforced,[14] the state has no such direct legal interest in such a corporation as to make a case cognizable by the supreme court by virtue of its original jurisdiction.[15]

§ 612. **Court does not act of its own Motion.** A court, however, cannot act unless it is properly invoked.[16] It cannot move solely of its own volition and upon its own motion, and without information or action on the part of any one. Where there is any mismanagement of a charity, or any misappropriation of its funds, the matter should be investigated and righted, but this must be done in a proper action conducted according to the forms and established rules of equity practice.[17] No matter how gross the wrong done, the court can act only if properly set in motion by a proper party.[18] That the trustees of a charity, required by the will to make annual reports to the court, fail to attach proper vouchers to such reports does not, therefore, give the court any authority to investigate the trustees without the formality of a lawsuit.[19]

§ 613. **Attorney General proper Complainant.** The question as to the proper complainant is readily solved when the nature of a public charity is considered. "Public charities are public blessings, and the commonwealth is interested in giving force and effect to them. They rebound to the interest of the commonwealth, and good policy requires that the beneficent objects of the founder should be carried out and enforced."[20] The state has such interest in them that, unless its assents, agreements between parties that the trust is to cease, are ineffective.[1] In addition, the beneficiaries of such trusts are vague and undefined and only in exceptional cases

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[13] 1826, Greene v. Dennis, 6 Conn. 293, 299, 16 Am. Dec. 58.

[14] 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 217.

[15] 1907, State v. Tabitha Home, 78 Neb. 651, 653, 111 N. W. 586.

[16] 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 681, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[17] 1906, Jenkins v. Berry, 122 Ky. 311, 316, 363, 28 Ky. Law Rep. 1224, 92 S. W. 10.

[18] 1911, State ex rel Heddens v. Rusk, 236 Mo. 201, 215, 139 S. W. 199.

[19] 1906, Jenkins v. Berry, supra.

[20] 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 220.

[1] 1910, Hamilton v. Mercer Home, 228 Pa. 410, 420, 77 Atl. 630.

able to act on behalf of the charity. In order that the trust may be maintained, it is, therefore, not only the right, but the duty of the state, through its law officers, to take action for their maintenance and enforcement.[2] This duty is exercised in America as in England through the attorney general,[3] who, therefore, is a proper, though he may not be a necessary,[4] party plaintiff or defendant as the representative of the public,[5] and whose duty it is to prevent the breach and to enforce the proper application of a charitable trust, and to compel the restitution of any part thereof which has been diverted to other purposes.[6] The state, through him as **parens patriae,** superintends the management of all public charities,[7] so that a suit brought by him to establish a charity becomes, in truth as well as in form, a suit to protect public interests,[8] and is, in fact, the only method by which the public can make its interest in the charity effective.[9] This practice developed in England under the statute of Elizabeth and obtains in America even in the absence of a statute expressly authorizing it.[10]

§ 614. **Attorney General as Defendant. Intervention.** There can, therefore, be no question but that the attorney general is in any case a proper party in a litigation involving a charitable trust, whether he appears as plaintiff[11] or as defendant.[12] He, therefore, has the right to intervene[13] in

[2] 1873, Attorney General v. Soule, 28 Mich. 153, 155.

[3] 1867, Jackson v. Phillips, 96 Mass. (14 Allen) 539, 579.

[4] 1919, Northwestern University v. Wesley Memorial Hospital, 290 Ill. 205, 125 N. E. 13.

[5] 1894, Attorney General v. Newberry Library, 150 Ill. 229, 37 N. E. 236 (Affirming 51 Ill. App. 166).

[6] 1914, Attorney General v. Bedard, 218 Mass. 378, 385, 105 N. E. 993; 1913, People v. Braucher, 258 Ill. 604, 608, 101 N. E. 944, 47 L. R. A. 1015.

[7] 1896, People v. Cogswell, 113 Cal. 129, 136, 45 Pac. 270, 35 L. R. A. 269.

[8] 1850, Parker v. May, 59 Mass. (5 Cush.) 336, 337.

[9] 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 220.

[10] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 618, 619.

[11] 1891, Dailey v. New Haven, 60 Conn. 314, 325, 22 Atl. 945, 14 L. R. A. 69; 1862, White School House v. Post, 31 Conn. 240, 258; 1867, State v. Fleming, 3 Del. Ch. 153, 517; 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 221; 1916, Crawford v. Nies, 224 Mass. 474, 113 N. E. 408, 413.

[12] 1910, Princeton University v. Wilson, 78 N. J. Eq. 1, 5, 78 Atl. 393; 1855, Harvard College v. Society for Promoting Theological Education, 69 Mass. (3 Gray) 280, 282; 1914, Sailor's Snug Harbor v. Carmody, 211 N. Y. 286, 300, 105 N. E. 543. But see 1867, Attorney General v. Reformed Protestant Dutch Church, 36 N. Y. 452, 453.

[13] See note 29 Ann. Cas. 138.

a case involving a public charity[14] which is valid on its face,[15] and such intervention will not be open to the objection that it is an interference with the property by the civil authorities.[16] It will, hence, be a prudent precaution, to say the least, on the part of heirs who deny the existence of the **cestin que trustent,** to make the attorney general a party so that their existence and capacity to take may be determined in an action to which their official representative is a party.[17] It has even been held that no decree can be rendered against the beneficiaries until they are represented by the attorney general.[18]

§ 615. **Attorney General not always a necessary party.** But though he is a proper party in any case, he is not for that reason in all cases a necessary party. "The public interests must be directly and essentially, rather than remotely and accidentally, involved as to some distinct issue in order to prevent the cause from proceeding to a decision without the presence of the attorney general as a party."[19] It has been held that he need not be joined where the charity is in the hands of trustees specifically charged by the donor with its management,[20] or where the trustee is a corporation,[21] or an institution.[1] Such cases, however, are exceptional. He has, therefore, been held to be a necessary party in actions brought by a beneficiary for himself and all others similarly situated,[2] or to prevent a sale of the property,[3] or for a

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See also 1901, Rothchild v. Goldenberg, 69 N. Y. Supp. 523, 58 App. Div. 499.

[14] No such right exists where the charity is private only. 1864, Attorney General v. Trinity Church, 91 Mass. (9 Allen) 422, 439.

[15] If the gift is invalid, no such right exists. 1891, People v. Simonson, 126 N. Y. 299, 27 N. E. 380.

[16] 1910, Brice v. All Saints Memorial Chapel, 31 R. I. 183, 195, 76 Atl. 774.

[17] 1916, Cummings v. Dent, 189 S. W. 1161 (Mo.).

[18] 1915, Bernhardsville M. E. Church v. Seney, 85 N. J. Eq. 271, 96 Atl. 388.

[19] 1921, Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852, 863, 864.

[20] 1883, Newberry v. Blatchford, 106 Ill. 584, 595.

[21] 1862, White School House v. Post, 31 Conn. 240, 258.

[1] 1918, Mary S. Fithian Night School v. College Board of Presbyterian Church, 88 N. J. Eq. 468, 102 Atl. 855, 858.

[2] 1913, Bliss v. Linden Cemetery Ass'n, 81 N. J. Eq. 394, 397, 87 Atl. 224; 1910, Larkin v. Wikoff, 75 N. J. Eq. 462, 72 Atl. 98, 79 Atl. 365 (Affirmed 77 N. J. Eq. 589, 78 Atl. 1134; reversed 79 N. J. Eq. 209, 81 Atl. 365).

[3] 1909, In re St. Michael's Church, 76 N. J. Eq. 524, 529, 74 Atl. 491.

cy pres application of the trust,[4] or for the appointment of a new trustee,[5] or for a construction of the instrument of donation.[6] On the whole, it will be good policy to make him a party in any case and thus prevent any fine question as to the necessity of his presence from arising.[7]

§ 616. **Information. Attorney General as Defendant.** In the great majority of cases, the attorney general will appear as plaintiff. The proper form of the action in such a case is by information on the relation of some individual. A private relator is important in such a case for the reason that someone must be responsible for costs if it appears that the information is unfounded.[8] Such an action, however, need not be prosecuted in person by the attorney general,[9] nor need he be requisitioned by the governor to begin it.[10] While he ordinarily appears as plaintiff, he may take part as defendant. It has, therefore, been stated that one of the remedies of a devisee who seeks to prevent the sale of the property is by bill on behalf of the plaintiff and the class he represents, making the attorney general a party defendant.[11] He may even intervene in the proceeding after the case has been appealed.[12] Where he has been made a defendant, and has answered and asked for the same relief prayed for in the petition, such relief will not be denied though the plaintiff has no technical right to sue in his own name, but should have acted as relator in an action begun by the attorney general.[13]

§ 617. **Other Parties.** It has already been intimated that the attorney general is not the only person entitled to bring an action. While the mayor of a city as such, or as a citizen,

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[4] 1844, Attorney General v. Jolly, 1 Rich. Eq. 99, 108, 1 Rich. Law 176 note (S. C.).

[5] 1915, Lakatong Lodge v. Franklin Township, 84 N. J. Eq. 112, 116, 92 Atl. 870.

[6] 1902, Hyde v. Hyde, 64 N. J. Eq. 6, 8, 53 Atl. 593.

[7] See 1900, Wall v. Mines, 130 Cal. 27, 45, 62 Pac. 386.

[8] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 618, 619; 1879, Attorney General v. Parker, 126 Mass. 216, 221 Citing 1877, Attorney General v. Butler, 123 Mass. 304.

[9] 1850, Parker v. May, 59 Mass. (5 Cush.) 336, 338; 1912, In re Creighton's Estate, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913, D. 128.

[10] 1850, Parker v. May, 59 Mass. (5 Cush.) 336.

[11] 1909, In re St. Michael's Church, 76 N. J. Eq. 524, 529, 74 Atl. 491.

[12] 1912, In re Creighton's Estate, supra.

[13] 1898, Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 125, 48 S. W. 960.

or taxpayer,[14] or a charitable society which may be selected by the trustees but has not yet been selected,[15] or the tenant of the life estate on which the trust rests,[16] or the widow and collateral heirs of the donor,[17] or a non-member of a church who is the grantor of its property,[18] cannot begin the proceedings, an actual beneficiary of the trust,[19] a person having an interest in the property,[20] or a member of the charitable society entrusted with the fund,[21] or the charitable society itself,[1] have been held to be capable of suing in their own name. Of course, private individuals suing on the theory that trusts established are public charities must show some private interest.[2] "If a student is expelled without any cause whatever, or even is refused admission without any cause, and the charity is a public one open to all persons who may see fit to avail themselves of its benefit, the courts would interfere in behalf of such person denied the rights that are guaranteed to all persons."[3] While the Kentucky court has limited the right to sue to the attorney general, the beneficiaries and the donor and his heirs,[4] the Vermont court has intimated that any one as **amicus curiae** can compel the enforcement of a charitable trust.[5] On the whole, it will be best to bring the action in the name of the attorney general wherever this is at all possible.

§ 618. **Necessary Parties.** The question of other neces-

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[14] 1905, Stearns v. Newport Hospital, 27 R. I. 309, 315, 62 Atl. 132.

[15] 1854, Female Association v. Beekman, 21 Barb. 565 (N. Y.).

[16] 1874, Miller v. Teachout, 24 Ohio St. 525, 535.

[17] 1910, Francis v. Preachers' Aid Society, 149 Iowa 158, 126 N. W. 1027, 1030.

[18] 1914, Nelson v. Monitor Congregational Church, 74 Ore. 162, 166, 145 Pac. 37.

[19] 1867, Attorney General v. Reformed Protestant Dutch Church, 36 N. Y. 452 (Affirming 33 Barb. 303); 1912, Ackerman v. Fichter, 179 Ind. 392, 403, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117.

[20] 1857, Baptist Church v. Presbyterian Church, 57 Ky. (18 B. Mon.) 635.

[21] 1855, Hullman v. Honcomp, 5 Ohio St. 237, 242; 1902, Van Hoven v. Immanual Presbyterian Church, 108 La. 274, 32 So. 389.

[1] 1910, Ingleside Ass'n v. Nation, 83 Kans. 172, 109 Pac. 984; 1922, Clarion v. Central Savings Bank, 71 Colo. 482, 208 Pac. 251.

[2] 1921, Krauthoff v. Attorney General, 240 Mass. 88, 132 N. E. 865.

[3] 1901, Koblitz v. Western Reserve University, 21 Ohio Cir. Ct. Rep. 144, 154, 11 Ohio C. Dec. 515.

[4] 1841, Chambers v. Baptist Education Society, 40 Ky. (1 B. Mon.) 215, 221.

[5] 1878, Clement v. Hyde, 50 Vt. 716, 722, 28 Am. Rep. 522.

sary parties deserves a passing notice. Where trustees are charged with a breach of trust, all trustees, whether they have been directly appointed by the donor or have been selected by others, whether they are active at the time or not, are necessary parties.[6] Where beneficiaries have been appointed, they must be joined before judgment will be rendered.[7] Where two-fifths of a fund is given to one, and three-fifths to another church, on condition that they select two and three trustees respectively, and that each should forfeit its share by failing to do so, the rights of the church which has complied with this condition cannot be determined until the other is made a party.[8]

§ 619. **Settlement of Law Suit.** Whether a pending litigation can be legally settled or must be fought out to the bitter end is often an important question to both sides. It is clear that the parties have no power to reach down to the very foundation of the charity and set aside the will of the donor.[9] The trust itself is not and cannot be affected by any compromise as neither the court nor the litigants have power and authority to change its nature and purpose.[10] Neither can the use be diverted by the beneficiaries for the time being through an agreement or arbitration. They cannot alien it, for the property is not theirs to sell. They cannot donate it, for the title is not in them. They cannot misapply it, for the use for which it was created cannot be changed.[11] But, while this is true, the right to compromise a controversy in a proper case is undeniable. Where, therefore, a charitable gift is contingent on certain events, the trust is not perverted by a compromise agreement through which the trustees receive a certain definite amount of property impressed with the same trust in lieu of the contingent interest.[12] Where a situation exists about which well-

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[6] 1879, Attorney General v. Parker, 126 Mass. 216.

[7] 1888, Wright v. O'Brian, 48 Hun. 618, 1 N. Y. Supp. 303, 15 N. Y. St. Rep. 1011.

[8] 1888, Safford v. Fogler, 14 Atl. 289 (Me.).

[9] 1913, Morris v. Boyd, 110 Ark. 468, 477, 162 S. W. 69.

[10] 1892, Brewer v. University of North Carolina, 110 N. C. 26, 14 S. E. 644; 1904, Lake v. Hood, 35 Tex. Civ. App. 32, 79 S. W. 323.

[11] 1875, Orford Union Congregational Society v. West Congregational Society, 55 N. H. 463.

[12] 1901, Johnson v. Osment, 108 Tenn. 32, 37, 65 S. W. 23.

informed lawyers and judges may easily differ, and about which the parties themselves differ,[13] trustees have implied power, under the sanction of the court, to adjust and compromise so as to avoid expensive and protracted litigation,[14] but should procure the assistance of the attorney general,[15] through whom only a final and conclusive settlement can be made.[16] Therefore, the Arkansas court has approved a compromise by which the charitable donee received about one-fifth of a $300,000 estate intended for it by the testator. In this case the widow took forty per cent, the children twenty per cent, and the remaining forty per cent had been used in part to bring to justice the assassinator of the donor.[17]

§ 620. **Costs in Charity Litigation.** The question of costs in charity litigation has given rise to some discussion.[18] It is clear indeed that an heir who brings an unsuccessful suit for selfish reasons to have a charity declared void is not entitled to costs.[19] It is equally clear that costs should be allowed out of the estate where there are reasonable grounds to bring the question into the court.[20] Certainly, where a trustee has acted in good faith and with great fidelity, and the case is not so plain that the court can decide it at first blush, the trustee will not be mulcted in costs because he has availed himself of the court's advice.[21] This is so even where the question is appealed to the supreme court in order to have it finally determined and clear away all difficulties

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[13] 1916, Simmon v. Hunt, 171 Ky. 397, 188 S. W. 495.

[14] 1847, Attorney General v. Wallace, 46 Ky. (7 B. Mon.) 611, 622.

[15] 1761, **In re** Alford, cited 93 Mass. (11 Allen) 458, 459.

[16] 1875, Orford Union Congregational Society v. West Congregational Society, 55 N. H. 463, 467; 1859, Attorney General v. Dublin, 38 N. H. 459; 1898, Rolfe and Rumford Asylum v. Lefebre, 69 N. H. 238, 240, 45 Atl. 1087. Such compromise cannot be disturbed by an appeal taken by citizens of the town which was intended as the beneficiary, no matter how honorable their character and motives may be.

[17] 1922, McCarroll v. Grand Lodge, 154 Ark. 376, 243 S. W. 870.

[18] 1914, West v. St. James Episcopal Church, 83 N. J. Eq. 324, 91 Atl. 101; 1893, Barnard v. Adams, 58 Fed. 313, 319.

[19] 1906, Tincher v. Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[20] 1868, Attorney General v. Moore, 19 N. J. Eq. 503, 519 (Affirming 18 N. J. Eq. 256).

[21] 1920, Hartman v. Pendleton, 96 Or. 503, 186 Pac. 572, 579; 1911, Larkin v. Wikoff, 79 N. J. Eq. 209, 81 Atl. 365.

though the judgment of the lower court is affirmed.[22] Where the heirs are successful only in part, the unsuccessful charities are not entitled to any costs, while all other costs must be paid out of that portion which the heirs have recovered.[1]

§ 621. **Supervision by Commission.** The courts are not the only bodies which supervise charitable trusts. Commissions of one kind or another are in this day and generation multiplying at a rapid rate and are taking over important branches of the government. The very subject of this book is to-day almost completely regulated by such a commission in England. The main, though abortive purpose of the statute of Elizabeth, was to create a commission.[2] The same development has begun in America and has a promising future. New York has created a state board of charities which watches over the manner in which institutions devoted to charitable objects are conducted, with a view to checking abuses and to preventing such bodies from being used as a means of private emolument.[3] Under the power given by the constitution to this state board to "visit and inspect" charitable institutions, such board may require the trustees of any charity to make written reports of the visits and inspections of its own trustees, and of their attendance at its regular and special meetings, and to furnish copies of the minutes of such meetings. The annoyance thus caused to the charity is no reason why the law should not be enforced.[4]

§ 622. **Municipal Regulations.** Regulations of charities have sometimes been attempted by cities. Such action, however, is very much circumscribed. Where a city is made the trustee of a charity, an ordinance passed by it regulating the administration of the trust cannot contravene the directions given by the donor and be valid.[5] Neither can a city place into the hands of a municipal charities commission the abso-

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[22] 1915, Kimberly's Estate, 249 Pa. 483, 492, 95 Atl. 86.

[1] 1891, Booth v. Baptist Church of Christ, 126 N. Y. 215, 28 N. E. 238.

[2] See Section 15, **supra.**

[3] 1877, New York Juvenile Guardian Society v. Roosevelt, 7 Daly 188, 195 (N. Y.). See 1896, People v. Fitch, 39 N. Y. Supp. 926, 16 Misc. 464; 1897, People v. Brooklyn, 152 N. Y. 399, 46 N. E. 852; 1900, People v. New York Society for the Prevention of Cruelty to Children, 161 N. Y. 233, 55 N. E. 1063.

[4] 1922, Newton v. Lewis, 196 N. Y. Supp. 711, 203 App. Div. 395.

[5] 1867, Field v. Girard College, 54 Pa. (4 P. F. Smith) 233, 238.

lute power to prevent any person from soliciting for charity regardless of his personal worth or fitness. "The utmost limit of reasonable regulation in the matter is reached by acts protecting the public from charlatans and imposters, insuring knowledge on the part of the donors of the purposes to which their contributions may be put, coupled with adequate safeguards against maladversion as to the funds received."[6]

§ 623. **Summary.** The supervision of a charity in the first instance reposes in its founder, or his heirs, or in the person whom he has appointed as visitor. Where the founders are very numerous, as is the case in charities raised or maintained by public subscription, or where they are dead, as is usually the case, and have appointed no personal visitor, and their heirs are numerous, hostile, or otherwise unfit for such duty, this supervision, however, breaks down completely, and a substitute is urgently called for. This is furnished by the action of the courts whose jurisdiction in such matters is such that it cannot be excluded by any provision framed by the donor. The courts, however, cannot act on their own initiative, but must be set in motion by a proper party. The attorney general in all such cases is a proper party, and in many instances, particularly where a settlement is attempted, he is a necessary party. While he may appear as a defendant, his proper position is that of a plaintiff, acting, however, on the relation of some private individual who thereby becomes responsible for the costs of the action. Beside the visitation by private individuals and the supervision of the courts, charities are further subject, in some jurisdictions, to the action of state or municipal commissions whose sphere of action, however, is rather circumscribed.

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[6] 1916, Ex Parte Dart, 172 Cal. 47, 155 Pac. 63, 66.

CHAPTER XVI

TERMINATION

§ 634. **Temporary Charities.** Charitable trusts are not necessarily intended to be perpetual. While it is frequently the fond hope of their founders that they will continue forever, they may be created for a temporary purpose only. In such case the fulfillment of such purpose terminates the trust. A legacy, given so long as the church beneficiary shall bear public testimony against slavery and intemperance, ceases when such testimony has come to an end.[1]

§ 635. **Methods of Termination.** Cases in which the donor intends only a short life for his charity are, however, the exception. Interesting questions concerning the termination of such trusts, however, are certain to arise. Such trusts may be terminated by adverse possession,[2] may fail by laches,[3] or lack of funds,[4] may lapse,[5] or may come to an end by the complete consumption of the fund donated. While a charity established for the benefit of an unincorporated religious society is not terminated by its incorporation,[6] it may lapse by its extinction whether this event takes place before[7] or after[8] the gift has become effective, and even though an assignment to another society has been made by

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[1] 1878, **In re** Congregational Church in Union Village, 6 Abb. N. C. 398, 406 (N. Y.).

[2] 1873, Congregational Society v. Newington, 53 N. H. 595; 1888, Newton Academy v. Bank of Ashville, 101 N. C. 483, 8 S. E. 174. But see 1921, Hicks v. Providence, 43 R. I. 484, 113 Atl. 791.

[3] 1895, Church of Christ v. Reorganized Church of Jesus Christ, 71 Fed. 250, 17 C. C. A. 397, 36 U. S. App. 379 (Certiorari denied 163 U. S. 681, 41 L. Ed. 314, 16 S. C. Rep. 1199).

[4] 1877, Acklin v. Paschal, 48 Tex. 147, 167. The objects of the trust may be fully accomplished while funds still remain. See note 53 Solicitors Journal 282.

[5] 1923, **In re** Mills Will, 200 N. Y. Supp. 701, 121 Misc. 147.

[6] 1859, Attorney General v. Dublin, 38 N. H. 459, 575.

[7] 1893, Merrill v. Hayden, 86 Me. 133, 29 Atl. 949; 1912, Lynch v. South Congregational Parish of Augusta, 109 Me. 32, 35, 82 Atl. 432; 1916, Cummings v. Dent, 189 S. W. 1161 (Mo.).

[8] 1889, Mott v. Danville Seminary, 129 Ill. 403, 409, 21 N. E. 927. 1907, Miller v. Riddle, 227 Ill. 53, 81 N. E. 48, 118 Am. St. Rep. 261; 1914, Burgess v. Peth, 79 Wash. 298, 140 Pac. 351.

it.[9] A dissolution of a charitable trust by a distribution of its property among the members of a charitable society, however, will not be recognized.[10] The members of a Shaker society, having received support and maintenance for life, have accepted a consideration for the property which they have conveyed to the society, and their heirs cannot, on its dissolution, recover under a resulting trust.[11] However, the fact that the real estate of a charity has been leased for 999 years at a nominal yearly rent (a situation closely analogous to that created by a deed), does not terminate the trust imposed upon the property. Says the Pennsylvania court: "We can see no reason for excusing a corporation which acts as trustee for a charity from exercising due diligence in the assertion of its legal rights against strangers."[12] A statute, which authorizes donors who have procured the incorporation of an educational institution or their heirs to bring dissolution proceedings against it for diverting its property from its corporate purposes, is unconstitutional as discriminating against other donors who, before or after the incorporation, may have contributed equal or larger sums.[13]

§ 636. **Conditions. Generally.** Such cases are rather extraordinary. When they happen, however, the trust is terminated, whether conditions had been appended to it or not. This leaves a class of cases in which conditions of one kind or another have been imposed by the donor. Even such cases are not very frequent. It has, therefore, been said that charitable trusts are more often free from than subject to the incidents of reversion and resulting trusts.[14]

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[9] 1850, Andrew v. New York Bible and Prayer Book Society, 6 N. Y. Super. Ct. (4 Sandf.) 156 (Reversed 8 N. Y. (4 Seld.) 559, Seld. Notes 192). In Kentucky it has been held that where grounds of over thirty acres and a fund of $10,000 are given to trustees for a cemetery, and not a single interment has been made in more than ten years, the donor may have his gift set aside and annulled because the purpose of the trust has failed by the failure or refusal of its intended beneficiaries to accept it. 1923, Carlisle County v. Norris, —— Ky. ——, 254 S. W. 1044.

[10] 1838, Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392.

[11] 1918, Easum v. Bohon, 180 Ky. 451, 202 S. W. 901, L. R. A. 1918, D. 1144.

[12] 1913, Kingston v. Lehigh Valley Coal Co., 241 Pa. 469, 88 Atl. 763, 49 L. R. A. (N. S.) 557, 560.

[13] 1922, People v. Greer College, 302 Ill. 538, 135 N. E. 80.

[14] 1890, Campbell v. Kansas City, 102 Mo. 326, 345, 346, 13 S. W. 897, 10 L. R. A. 593.

§ 637. **Reverter Clause. Single Donor.** From the viewpoint of disappointed heirs and next of kin, the importance of conditions in a charitable gift cannot be exaggerated. When a valid charitable trust has been created without a provision for a reversion, it raises an implied condition against a reverter,[15] permanently excludes the interests of the heirs and next of kin,[16] does not revert to them,[17] does not entitle them to anything on the breach of the trust,[18] cannot be renounced or conveyed away,[19] or reconveyed[20] or returned[21] to them by the trustee, or defeated by non-user or alienation,[22] by the abandonment of its use by a part of the beneficiaries,[23] by the act of its trustee (a corporation) in turning over part of its work to another corporation,[24] and does not leave them as such a "scintilla of right"[25] or any interest[26] which they can release.[1] Such a trust will not be permitted to fail through any improper action on the part of the trustee in its administration,[2] or by any mere

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[15] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 795. See contra 1912, Grundy v. Neal, 147 Ky. 729, 145 S. W. 401.

[16] 1872, Academy of the Visitation v. St. Clemens, 50 Mo. 167, 172; 1915, Stewart v. Franchetti, 153 N. Y. Supp. 453, 457, 167 App. Div. 541; 1895, White v. Keller, 68 Fed. 796, 806, 15 C. C. A. 683, 30 U. S. App. 275.

[17] 1906, Crow v. Clay County, 196 Mo. 234, 261, 95 S. W. 369.

[18] 1854, Barr v. Weld, 24 Pa. (12 Harris) 84, 87.

[19] 1865, Drury v. Natick, 92 Mass. (10 Allen) 169, 183.

[20] 1896, Christ Church v. Trustees of Donations and Bequests, 67 Conn. 554, 570, 35 Atl. 552.

[21] 1837, Langdon v. Plymouth Congregational Society, 12 Conn. 113.

[22] 1891, In re Sellers Methodist Episcopal Church, 139 Pa. 61, 67, 21 Atl. 145, 11 L. R. A. 282.

[23] 1857, Baptist Church v. Presbyterian Church, 57 Ky. (18 B. Mon.) 635.

[24] 1881, Soldiers' Orphans' Home v. Wolf, 10 Mo. App. 596. Of course, the act of the corporation of paying over to a lobbyist who had procured a legislative grant of $7,500 to it under an agreement with one of its directors that he was to retain all in excess of $5,000 is a valid ground for dissolving the corporation. 1873, People v. Dispensary and Hospital Society, 7 N. Y. Supr. Ct. Rep. (7 Lans.) 304.

[25] 1895, Clark v. Oliver, 91 Va. 421, 425, 22 S. E. 175.

[26] 1836, Sanderson v. White, 35 Mass. (18 Pick.) 328, 29 Am. Dec. 591; 1915, Sandusky v. Sandusky, 265 Mo. 219, 177 S. W. 390; 1856, Brown v. Concord, 33 N. H. 285.

[1] 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 317, 82 Atl. 582.

[2] 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 315, 82 Atl. 582; 1896, People v. Cogswell, 113 Cal. 129, 141, 45 Pac. 270, 35 L. R. A. 269; 1897, Sickles v. New Orleans, 80 Fed. 868, 874, 26 C. C. A. 204.

non-user on their part.[3] That the donor's intentions are not being carried out is no sufficient reason to set the trust aside.[4] The property will not revert to the heirs because the expectations of the testator have not been completely fulfilled, or because the funds have not been exclusively applied to the objects pointed out by him.[5] "It is by no means an unusual thing to find that a gift or devise in trust for a charitable use is inadequate to secure the successful accomplishment of the generous purpose of the donor, but the trust does not for that reason fail, nor, in the absence of some provision for a reverter or of some condition precedent or subsequent attached to the gift by the donor himself, does it open the door to his heirs to lay claim to the trust property."[6] The fitting remedy in such a case is not a forfeiture to the grantor or his heirs, but an equitable proceeding to enforce the trust.[7] There can be no failure of such a trust so as to cause a reverter to the donor so long as courts can find means to carry out the charitable purpose.[8] That a reasonable time has elapsed without any action to accomplish the donor's object is, therefore, no reason to declare a lapse of the trust.[9] That the trustees are violating the duties imposed upon them by employing a married man in the school established by the testator is no reason why the school itself should be deprived of the benefit of the gift.[10] A trust for a church is not terminated by the occasional temporary use of it for lectures, singing schools, etc.[11] A gift of land for a hospital does not, in the absence of a reverter clause, go back to the heirs though the hospital has been abandoned, and the property has become the refuge of Indians, has been burned by them and has thereafter been used for a cemetery, and eventually

[3] 1896, Stuart v. Easton, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238 (Affirmed 170 U. S. 383, 42 L. Ed. 1078, 18 S. C. Rep. 650); 1897, Sickles v. New Orleans, 80 Fed. 868, 874, 26 C. C. A. 204.

[4] 1917, American Colonization Society v. Soulsby, 129 Md. 605, 99 Atl. 944, 949.

[5] 1910, Taylor v. Columbian University, 35 App. D. C. 68, 74 (Affirmed 226 U. S. 126, 33 S. Ct. 73).

[6] 1922, Mary Franklin Home for Aged Women v. Edson, 193 Iowa 567, 187 N. W. 546, 549.

[7] 1869, Brown v. Meeting Street Baptist Society, 9 R. I. 177, 186.

[8] 1916, Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, 793.

[9] 1862, Tainter v. Clark, 87 Mass. (5 Allen) 66.

[10] 1861, Silcox v. Harper, 32 Ga. 639, 649.

[11] 1857, Chapin v. School District, 35 N. H. 445, 452.

has been sold.[12] A bequest to be expended in maintaining and educating some one of the donor's grand-nephews (in the order named) for the priesthood is not exhausted by two futile attempts, but remains in force until some grand-nephew has actually reached the destination set for him by the testator.[13] Where a trust deed to a church society provides that in case of breach the convention of the denomination shall take the property, all other conditions are excluded and the heirs can take nothing.[14] Where a gift of $50,000 is made to a college with the understanding that it is to be a permanent endowment fund, and that the college is to adopt the name of the donor, a merger of the college with another and the adoption of the name of the latter has been held not to produce a forfeiture in the absence of a forfeiture clause.[15]

§ 638. **Subscription.** What applies to a single donor applies with double and treble force to multiple donors, such as subscribers to charitable funds. If contributors to such a fund were to retain an interest in it in proportion to the part of the fund which they have contributed, an endless and unprofitable train of petty litigation would be the result.[16] Where a building has, therefore, been erected in part by individual contributions, the contributors have no title to it which they can convey.[17] Persons who, in 1806, have contributed to the building of a schoolhouse for the benefit of the people of the community, cannot, after the building has been burned in the war of 1812, claim the compensation paid for its loss by the federal government.[18] A subscriber to a charitable corporation cannot recover his subscription after the corporation has ceased to be active, leaving debts outstanding.[19] A contribution to a church does not give the contributor any right in its property after the church is dis-

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[12] 1848, De Pontabla v. New Orleans, 3 La. Ann. 660.

[13] 1837, In re Flaherty, 2 Pars. Eq. Cas. 186 (Pa.).

[14] 1923, Bristol Baptist Church v. Connecticut Baptist Convention, 98 Conn. 677, 120 Atl. 497.

[15] 1922, Lupton v. Leander Clark College, 194 Iowa 1008, 187 N. W. 496.

[16] 1832, Methodist Church v. Remmington, 1 Watts 219, 227, 26 Am. Dec. 61 (Pa.).

[17] 1885, Pierce v. Weaver, 65 Tex. 44, 48.

[18] 1837, Potter v. Chapin, 6 Paige 639, 650 (N. Y.).

[19] 1888, Magee v. Genesee Academy, 49 Hun. 605, 1 N. Y. Supp. 709, 17 N. Y. St. Rep. 221.

solved, where, by the law of its existence, such property passes to the general body on the happening of such an event.[20]

§ 639. **Condition. Effect.** What has just been said applies only where there is no express reverter condition appended to the gift. A donor of a charitable trust may, without endangering the validity of his gift,[21] annex to it any lawful condition or limitation.[22] He may make the enjoyment of his bounty dependent upon a condition that the donee is not to join any society connected with a certain church,[1] or that the church beneficiary is to enjoy the gift only so long as it maintains its present essential doctrines and principles of faith and practice.[2] Where there is such a condition, an entirely new situation arises and a forfeiture may take place on the breach of it.[3] "Where the intention is to dedicate property to charitable uses, there is a difference between a conveyance **on condition,** and a conveyance in trust. In the first case the grantor and those claiming under him may enter for condition broken. But in the last they cannot, and the proper remedy for an abuse of the trust is an application to the chancery powers of the Court for an appointment of new trustees."[4] Where, therefore, contributions are made upon certain express conditions, the rights of the donors stand upon contract; and if the conditions are not performed, their obligation is at an end.[5] It follows that a gift conditioned on the acceptance of certain officials,[6] or on the fact that a certain amount be raised within a certain time,[7] or on any other condition which has not been complied with, though a reasonable time has elapsed,[8]

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[20] 1914, Heisler v. Methodist Protestant Church, 166 Iowa 333, 147 N. W. 750.

[21] 1909, Kasey v. Fidelity Trust Co., 131 Ky. 609, 623, 624, 115 S. W. 739.

[22] 1889, Adams Female Academy v. Adams, 65 N. H. 225, 227, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785.

[1] 1884, Barnum v. Baldimore, 62 Md. 275, 291, 50 Am. Rep. 219.

[2] 1852, Princeton v. Adams, 64 Mass. (10 Cush.) 129.

[3] 1912, Norton v. Valentine, 135 N. Y. Supp. 1084, 151 App. Div. 392.

[4] 1854, Barr v. Weld, 24 Pa. (12 Harris) 84, 86, 87.

[5] 1881, Printing House v. Trustees, 104 U. S. 711, 727, 26 L. Ed. 902.

[6] 1913, Morristown Trust Co. v. Morristown, 82 N. J. Eq. 521, 523, 91 Atl. 736.

[7] 1879, First Baptist Church v. Robberson, 71 Mo. 326, 332.

[8] 1858, Appeal of Domestic and Foreign Missionary Society, 30 Pa. (6 Casey) 425, 437.

falls to the ground. Even an executed gift on condition that a certain home be built,[9] or that a certain professorship be created,[10] will revert to the donor or his heirs where such condition has been broken. Of course, such a condition may be waived by the donors.[11]

§ 640. **Conditions. Liberal Construction.** Courts, however, will not grasp at straws in an effort to discover conditions on which to base a reverter. No condition will be implied,[12] and words of "express condition" may even be construed as words of trust.[13] Provisions which explain the object of the donor, or indicate his purpose to make the trust perpetual, or guide the trustee in its management, will not be construed as conditions.[14] A clause in the will of Thaddeus Stevens, in which the testator sacrificed clearness to briefness by providing that "if the aggregate sum shall then (at the time the will took effect) amount to fifty thousand dollars, without which no further disposition can be made, I give it all to my trustees," has, therefore, been construed as not creating a condition, and the gift has been vested in the charity though at the time it was somewhat below the sum named.[15] Where an executor, by deeds duly executed, exchanged property devised to an orphan asylum for other property of the estate, a stipulation in the deed from the executor, that the property was for the use and benefit of such asylum, does not create a condition which will work a forfeiture but only a covenant.[16] A gift to a church of real property to be held as a parsonage, and of money to be invested by trustees, to be selected by it, the income to be used to keep the parsonage in repair and to maintain singing in the church, has been construed as an absolute gift and not

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[9] 1915, Green v. Old People's Home, 269 Ill. 134, 109 N. E. 701 (Reversing 190 Ill. App. 152).

[10] 1899, American Church Missionary Society v. Griswolt College, 58 N. Y. Supp. 3, 27 Misc. 42.

[11] 1921, McGee Presbytery v. Unknown Heirs of Smith, —— Mo. ——, 232 S. W. 460.

[12] 1869, Brown v. Meeting Street Baptist Society, 9 R. I. 177, 186. But see 1912, Grundy v. Neal, 147 Ky. 729, 145 N. E. 401.

[13] 1907, Ashuelot National Bank v. Keene, 74 N. H. 148, 65 Atl. 826, 9 L. R. A. (N. S.) 758; 1905, MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 661, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[14] 1912, Bridgeport Public Library v. Burrough's Home, 85 Conn. 309, 315, 82 Atl. 582.

[15] 1894, Steven's Appeal, 164 Pa. 209, 30 Atl. 243.

[16] 1922, National Finance Corporation v. Robinson, 193 Ky. 649, 237 S. W. 418.

as a gift in trust, in order to defeat an action by the residuary legatee claiming the property for condition broken.[17]

§ 641. **Conditions. Illustrations of Liberal Construction.** Even where a provision is undeniably a condition, it will not be construed with a view to overturn the charity created by the gift. Forfeitures are not favored in either law or equity and will not be decreed for trivial reasons.[18] The law will raise every intentment in favor of a charity and against the grantor and those who claim under him. A reverter clause, applicable in case the property is converted to any other use, will be fairly and liberally construed according to its spirit, to refer only to a permanent diversion and not merely to an occasional use different from that contemplated.[19] Mere non-user will not forfeit property conveyed to a charity with a condition that it shall revert if used for any other purpose.[20] A delay of three years, while efforts are being made to establish the home founded but not endowed by the donor, and a renting of the property in the meantime to pay taxes, insurance, and repairs, does not constitute a breach of such condition.[21] A condition requiring the erection of the institution contemplated by the donor, within three years of his death, will be liberally construed so as to avoid a forfeiture.[22] Even a misuse will not have that effect. "If the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heirs or legal representatives of the donor, unless there is an express condition of the gift that it shall revert to the donor or his heirs in case the trust is abused."[23] A bequest to a home "so long as said institution shall maintain and care for William Gordon" will not be defeated by the expulsion of Gordon from such home before testator's death where the home, on learning of the gift, has done everything within its power to main-

[17] 1922, Whitmore v. Church of the Holy Cross, 121 Me. 391, 117 Atl. 469.

[18] 1920, Bancroft v. Maine Sanitarium Ass'n, 119 Me. 56, 109 Atl. 585, 590.

[19] 1851, McKissick v. Pickle, 16 Pa. (4 Harris) 140. But see 1853, Pickle v. McKissick, 21 Pa. (9 Harris) 232.

[20] 1853, Pickle v. McKissick, 21 Pa. (9 Harris) 232, 235.

[21] 1900, Capen v. Skinner, 177 Mass. 84, 58 N. E. 473.

[22] 1922, Peek v. Women's Home Missionary Society, 304 Ill. 427, 136 N. E. 772.

[23] 1922, People v. Greer College, 302 Ill. 538, 135 N. E. 80, 83.

tain Gordon in or without its premises.[24] An intention "to create vital conditions likely to prevent the vesting and execution of the trust are not lightly to be inferred, but must clearly appear from the words of the instrument creating the trust."[25]

§ 642. **Conditions Precedent and Subsequent.** The division of conditions into conditions precedent and conditions subsequent is familiar. So is the rule that the latter are favored whenever there is any doubt.[26] This rule applies with peculiar force to charitable trusts. Conditions which, in the case of an ordinary trust, will be held to be conditions precedent, will, in the case of a charitable trust, be held to be conditions subsequent.[27] The contemplated conveyance of a site to a third person,[28] the acceptance by a township of a proposed library,[1] or the raising of a fund in support of the charity contemplated by the donor[2] have, therefore, been construed to create only conditions subsequent. The same is true in regard to various clauses by which the testator seeks to make it certain that his name will be included in the name of the proposed institution.[3] A gift to a charitable corporation, "provided" that it extend its benefits in a certain way to the members of a certain class, has been construed as an absolute gift with a condition subsequent attached.[4] A gift to a school district, with a proviso that if testator's son shall reappear it is to go to him, has been held to create a defeasible title.[5] A contribution toward the establishment of a charitable trust, "to assist in an humble way" in the founding of an institution, is a gift on condition subsequent, and the trustee cannot be forced to com-

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[24] 1881, Livingston v. Gordon, 84 N. Y. 136 (Affirming 7 Abb. N. C. 53).

[25] 1923, Attorney General v. Lowell, —— Mass. ——, 141 N. E. 45, 48.

[26] 1922, Woman's Seaman's Friend Society v. Boston Y. W. C. A., 240 Mass. 521, 134 N. E. 601.

[27] 1912, Franklin v. Hastings, 253 Ill. 46, 51, 97 N. E. 265, Ann. Cas. 1913, A. 135.

[28] 1893, Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

[1] 1922, Clarion v. Central Savings Bank, 71 Colo. 482, 208 Pac. 251.

[2] 1912, Franklin v. Hastings, supra.

[3] 1920, Herron v. Stanton, —— Ind. App. ——, 128 N. E. 363, 367.

[4] 1900, Bennett v. Baltimore Humane Impartial Society, 91 Md. 10, 45 Atl. 888.

[5] 1903, Commonwealth v. Pollit, 25 Ky. Law Rep. 790, 76 S. W. 412.

plete it. Such a condition must be performed within a reasonable time.[6]

§ 643. **Conditions Precedent possible.** The favor which courts extend to charities by construing conditions to be conditions subsequent, wherever this is possible, does not mean that conditions precedent cannot be created. In a proper case, it will be held that a condition creates a condition precedent and that hence the gift is void from its inception. Thus, the Colorado court has held a gift to a county or city, upon a condition which the donee had no power to perform, to be void from the beginning.[7] The Massachusetts court has decided that a provision in a will that, if the beneficiary shall, within six months of the receipt of a notice that the legacy is ready, accept it with all its terms and conditions, such legacy shall be paid over, is a condition precedent so that the legacy is lost by a non-compliance.[8] Similarly, the Illinois court has held that a gift of land to a city outside of its boundaries, on condition that the beneficiary within a reasonable time accept and improve it for park purposes, creates a condition precedent.[9]

§ 644. **Charity created by State.** It has sometimes happened that the state has contributed a part of the funds of a defunct charity. The legal situation in such a case is clear. The state may take back the property contributed by it to a charitable corporation where such corporation is dissolved.[10] The same holds good of a city.[11] With the exception of a case where the other donors are unascertainable, and in which the property goes to the state on the principle of an escheat,[12] it cannot, however, take more than it has contributed. It cannot, where it has contributed to an institution for the blind, take the whole amount of its funds contributed by

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[6] 1920, Nolfe v. Byrne, 142 Tenn. 309, 219 S. W. 1.

[7] 1911, Robbins v. Boulder County, 50 Colo. 610, 615, 115 Pac. 526.

[8] 1861, American Colonization Society v. Smith Charities, 84 Mass. (2 Allen) 302.

[9] 1920, Maguire v. Macomb, 293 Ill. 441, 127 N. E. 682.

[10] 1905, Avila v. New York, 94 N. Y. Supp. 1132, 106 App. Div. 120.

[11] 1902, Cone v. Wold, 85 Minn. 302, 88 N. W. 977.

[12] 1907, Boenhardt v. Loch, 107 N. Y. Supp. 786, 56 Misc. Rep. 406 (Affirmed 113 N. Y. Supp. 747, 129 App. Div. 355, which is affirmed, 198 N. Y. 631, 92 N. E. 1078).

many small gifts, but is limited to recovering the sum donated by it with interest.[13]

§ 645. **Impossible or Illegal Conditions. Louisiana Holdings.** It happens that conditions affixed to charitable gifts prove to be impossible or illegal. This situation has been frequently passed upon in Louisiana. In that state, except where testator's main intent is incorporated in the condition imposed by him,[14] illegal or impossible conditions are simply swept aside and the gift is enforced without them.[15] Where a gift has, therefore, once passed to charity, it cannot be diverted by any condition.[16] A clause in a will prohibiting a division between the two donees has, therefore, been held to be contrary to law, and has hence been regarded as not written.[17] A bequest to a bishop, creating him "my sole heir and universal legatee," has been carried out by stripping off a provision as follows: "To be distributed as he sees fit among my people in Ireland and for the future education of Thomas Regan."[18]

§ 646. **Impossible or Illegal Conditions. Other States.** A somewhat similar holding has occasionally been made in common law states, though the courts have not been so radical in regarding language actually present as constructively absent. It has, therefore, been held, where a vested estate was distinctly given and conditions, limitations, powers or trusts not permitted by law were attached, that these restraints and the estates limited on them, but not the principal estate, were void.[19] A charitable gift, given with a condition subsequent which was uncertain, insensible and

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[13] 1885, American Printing House v. Dupuy, 37 La. Ann. 188.

[14] 1909, Succession of Thompson, 123 La. 948, 49 So. 651. In this case, a bequest to an asylum which was limited for the use of widows and orphans, on condition "that a comfortable room and support will be furnished at the said home, for either one or all of my three daughters should misfortune render them homeless at any time" has been held to be void on account of the incapacity of the home to fulfill the condition, the daughters being of age and unmarried.

[15] 1853, State v. McDonogh, 8 La. Ann. 171, 250; 1857, Fink v. Fink, 12 La. Ann. 301; 1913, Succession of Villa, 132 La. 714, 722, 723, 61 So. 765.

[16] 1887, Succession of Vance, 39 La. Ann. 371, 374, 2 So. 54.

[17] 1858, New Orleans v. Baltimore, 13 La. Ann. 162.

[18] 1914, Succession of Reilly, 136 La. 347, 67 So. 27.

[19] 1863, Philadelphia v. Girard, 45 Pa. (9 Wright) 9, 27, 84 Am. Dec. 470.

void, has been held to vest absolutely in the trustees discharged of the condition.[20] A bequest, to all the inhabitants of a town but nine designated persons, for a school from which such nine persons and their descendants for a hundred years were to be excluded, has been upheld as a valid gift to the town, and the exception in regard to such nine persons has been held to be void as contrary to good morals and public policy.[1] Where the grantor has received full consideration for his property, he cannot impress upon it a condition against incumbrance. Such a condition would be but a contrivance by the grantee.[2]

§ 647. **Summary.** While a charitable trust may be terminated by adverse possession, the exhaustion of its funds, the extinction of its beneficiaries, and the accomplishment of its purpose, it will not, once created, revert to the donor or his heirs in the absence of conditions to that effect. Such conditions may be precedent or subsequent though the courts in the case of a charitable trust are strongly inclined to construe a condition to be subsequent rather than precedent. Where conditions, however, are of an unreasonable or illegal character, they will be disregarded by the courts, not only in Louisiana where the civil law prevails, but also in other states where the common law system is in force.

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[20] 1855, Newell's Appeal, 24 Pa. (12 Harris) 197, 199.

[1] 1851, Nourse v. Merriam, 62 Mass. (8 Cush.) 11.

[2] 1860, Magie v. German Evangelical Dutch Church, 13 N. J. Eq. (2 Beas.) 77 (Affirmed 15 N. Y. Eq. (2 McCart.) 500).

CHAPTER XVII

CONFLICT OF LAWS

§ 658. **Beneficiaries in other States. Validity.** The mere fact that the beneficiaries of a charitable trust live beyond the state under whose laws the gift has become effective, is generally of no special significance. It has indeed been stated in a Louisiana case that the privileges and favors extended to charities are inapplicable when attempted to be applied to the benefit of persons in other states.[1] The overwhelming weight of authority, however, is contrary to this contention. Generally, "a gift charitable in its nature will be upheld as valid though to be executed in a foreign country."[2] The various states do not forbid their citizens to create or foster, by gift or bequest, charities that have their seat of operation in other states or countries.[3] Conversely, they permit the citizens of other states or countries to dispense charity within their boundaries in such measure as they wish, and according to such methods as their own laws prescribe.[4] The mere fact that a charity is to be administered in another country does not render it obnoxious.[5] Charities and charitable institutions need, therefore, not limit their sphere of operations to state lines.[6] Foreign corporations for missionary purposes need not file their certificates with the secretary of state in order to be authorized to do their work in the state.[7] Charitable trusts may be made in one state to be executed in another[8] for the benefit of a certain class in

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[1] 1853, State v. McDonogh, 8 La. Ann. 171, 249.

[2] 1917, Thorp v. Lund, 227 Mass. 474, 478, 116 N. E. 946, Ann. Cas. 1918, B. 1204.

[3] 1855, Thompson v. Swoope, 24 Pa. (12 Harris) 474, 480.

[4] 1893, Dammert v. Osborn, 140 N. Y. 30, 40, 35 N. E. 407 (Rehearing denied 141 N. Y. 564, 35 N. E. 1038).

[5] 1897, Teele v. Bishop of Derry, 168 Mass. 341, 342, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401.

[6] 1855, Thompson v. Swoope, supra; 1915, Kimberly's Estate, 249 Pa. 483, 490, 95 Atl. 86.

[7] 1914, Eaton v. Woman's Home Missionary Society, 264 Ill. 88, 105 N. E. 746.

[8] 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 328, 120 S. W. 283.

such foreign state,[9] and may be made direct to foreign charitable quasi corporations,[10] to foreign municipal corporations,[11] and to foreign charitable corporations[12] who, thereupon, may take to the extent of their powers,[13] but not beyond them.[14] "It is not more contrary to state policy to allow an artificial than a natural person of another state to take a testamentary gift."[15] Though no corporation can exist in West Virginia for the general benefit of a religious denomination, a gift to a foreign corporation enjoying such powers has, therefore, been upheld by the West Virginia court.[16] However, the American, not the English, **cy pres** doctrine will be applied, though the gift is to a church in Ireland.[17]

§ 659. **Practical Difficulties.** While the validity of a gift is not ordinarily affected by the fact that it is to be administered in another jurisdiction, the practical difficulties are somewhat increased by this fact. Two courts instead of one are involved, and the question arises as to the exact time when the power of the one ceases and the power of the other begins. Additional difficulties readily suggest themselves in view of the fact that radically different rules concerning charitable trusts prevail in the various states, not to speak of foreign countries.

§ 660. **Devises and Bequests. Situs. Validity.** It is hornbook doctrine that the validity of a gift of personal and

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[9] 1879, Sohier v. Burr, 127 Mass. 221, 223; 1839, Burbank v. Whitney, 41 Mass. (24 Pick.) 146, 35 Am. Dec. 312.

[10] 1887, In re Bullock, 6 Dem. Sur. 335, 11 N. Y. St. Rep. 700.

[11] 1884, Peynado v. Peynado, 82 Ky. 5, 13, 5 Ky. Law Rep. 753; 1891, In re Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620. See 1914, Case v. Hasse, 83 N. J. Eq. 170, 175, 93 Atl. 728.

[12] 1847, Voorhees v. Voorhees, 6 N. J. Eq. (2 Halst. Ch.) 511; 1879, Draper v. Harvard College, 57 How. Prac. 269 (N. Y.); 1889, Trustees v. Guthrie, 86 Va. 125, 143, 10 S. E. 318, 6 L. R. A. 321; 1907, Jordan v. Universalist General Convention, 107 Va. 79, 85, 57 S. E. 652; 1874, Roy v. Rowzie, 66 Va. (25 Grat.) 599; 1888, University v. Tucker, 31 W. Va. 621, 631, 8 S. E. 410.

[13] 1886, Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776. See 1914, Eaton v. Woman's Home Missionary Society, 264 Ill. 88, 105 N. E. 746.

[14] 1867, Cromie v. Louisville Orphan's Home Society, 66 Ky. (3 Bush.) 365, 383.

[15] 1864, Sherwood v. American Bible Society, 40 N. Y. (1 Keyes) 561, 4 Abb. Dec. 227.

[16] 1914, Osenton v. Elliott, 73 W. Va. 519, 525, 81 S. E. 837.

[17] 1897, Teele v. Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 62 Am. St. Rep. 401.

of real estate depends upon different considerations. Personal property, wherever situated, follows the person of its owner so far as its **situs** is concerned, while real estate, being immovable, remains under the jurisdiction of the state in which it is situated. The validity of a bequest must, therefore, be decided according to the law of testator's domicile, while that of a devise depends upon the law of the state where the land lies.[18]

§ 661. **Real and Personal Property. Difficulty in Distinguishing.** It will ordinarily not be hard to distinguish between personal and real estate, though the doctrine of conversion at times causes difficulties. Thus, where a resident of Virginia deeded land in Pennsylvania, the deed, however, amounting only to a power to sell and then willed the proceeds of such sale to charity, the will is governed by the law of Virginia and not by that of Pennsylvania.[19]

§ 662. **Personal Property. Domicile Deciding Factor.** Where personal property is involved, the domicile of the donor must be determined, and the validity of the gift adjudged according to the law of such domicile.[20] Such a gift by a resident of Maryland to a Scotch beneficiary must be judged by the Maryland and not by the Scotch law.[21] A bequest by a Connecticut testator to a bishop in Montana is governed by the Connecticut and not by the Montana law.[1] A similar donation by a resident of Peru is controlled by the Peru law, though the property at the time of the testator's death is actually in New York, and though the charity contemplated is to have its **situs** there.[2] Where a bequest is valid according to the laws of testator's domicile, the courts will not inquire whether it would be valid according to the laws of the state of its destination,[3] but will substitute a new trustee where the trustee, appointed by the donor, is

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[18] 1871, White v. Howard, 46 N. Y. 144, 159.

[19] 1873, Bible Society v. Pendleton, 7 W. Va. 79, 89.

[20] 1876, Fellows v. Miner, 119 Mass. 541, 544.

[21] 1876, Dumfries v. Abercrombie, 46 Md. 172, 180.

[1] 1911, United States Trust Co. v. Wood, 131 N. Y. Supp. 427, 146 App. Div. 751 (Affirmed 205 N. Y. 564, 98 N. E. 1118).

[2] 1893, Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407 (Rehearing denied 141 N. Y. 564, 35 N. E. 1088).

[3] 1839, Burbank v. Whitney, 41 Mass. (24 Pick.) 146, 35 Am. Dec. 312; 1913, Pottsdown Hospital v. New York Life Insurance and Trust Co., 208 Fed. 196.

incompetent to act.[4] Where, on the other hand, such gift is void according to the law of such domicile, it will be void everywhere.[5]

§ 663. **New York Rule.** To this rule one state forms an exception. It was laid down in 1871 by the New York appellate court that, where a will within the **lex domicilii** has all the forms and requisites to pass the title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is to be transmitted for administration, as indicated by the donor.[6] This ruling has been elaborated by the supreme court as follows: "While the laws of the testator's domicile govern as to the formal requisites essential to the validity of the will—the capacity of the testator and the construction of the instrument—the validity of particular bequests depends (unless expressly prohibited by the law of the testator's domicile) upon the law of the domicile of the legatee."[7] Hence, a gift of personalty, valid according to the laws of Massachusetts,[8] New Jersey,[9] or Connecticut,[10] the states where it was to be administered, has been upheld in New York, though it was executed by a donor domiciled in New York, and would have been invalid if it had been made to be executed in New York. The validity of such bequests under this ruling, therefore, depends on the law of the foreign state,[11] which, on ordinary principles, must be proved if the gift is not to be held to be invalid.[12] This extraordinary view is probably due to the narrow doctrine concerning charitable trusts which obtained in the Empire state

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[4] 1899, Handley v. Palmer, 91 Fed. 948, 951 (Affirmed 103 Fed. 39, 43 C. C. A. 100).

[5] 1854, Fontain v. Ravenel, 58 U. S. (17 How.) 369, 391, 15 L. Ed. 80.

[6] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 433.

[7] 1898, Congregational Unitarian Society v. Hale, 51 N. Y. Supp. 704, 707, 708, 29 App. Div. 396, 27 Civ. Prac. Rep. 303.

[8] 1873, Kennedy v. Palmer, 1 Thomp. and C. 581 (N. Y.).

[9] 1914, Ely v. Ely, 148 N. Y. Supp. 691, 163 App. Div. 320, 13 Mills 203 (Affirmed 219 N. Y. 112, 113 N. E. 800).

[10] 1914, In re Weekes, 146 N. Y. Supp. 1006, 85 Misc. Rep. 280; 1890, Plymouth Society of Milford v. Hepburn, 57 Hun. 161, 10 N. Y. Supp. 817, 32 N. Y. St. Rep. 943.

[11] 1906, Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428.

[12] 1897, Pratt v. Roman Catholic Orphan Asylum, 46 N. Y. Supp. 1035, 20 App. Div. 352 (Affirmed 166 N. Y. 593, 59 N. E. 1120).

in 1871, which naturally induced the courts to seek for exceptions. Though its **raison d'etre** has disappeared with the passage of the Tilden act,[13] the rule still appears to be in force.[14]

§ 664. **Situs of Real Property.** Real estate is absolutely dependent upon the law of the state in which it is situated.[15] No state will allow another state to decide such a question for it. The validity of a devise of New York land to a Massachusetts corporation, therefore, depends exclusively upon the laws of New York and is not affected in any manner by the laws of Massachusetts.[16] A devise of Washington land by an owner domiciled in California may be valid, though it would be void if it covered California land.[17] A charitable trust impressed on Illinois and New Jersey land by a testator domiciled in New York, which trust is valid according to local law, remains valid though the land has been sold and the proceeds brought to New York, by whose law the original devise would have been invalid.[18] Vice versa it would seem that a devise to a foreign corporation of West Virginia land is absolutely void where the corporation could not be incorporated in West Virginia.[19]

§ 665. **Which Court is to supervise?** Where a gift is made under the laws of one state to be administered in another state, the question of the proper court to supervise its administration will not cause much difficulty. Granted that the gift is valid by the laws of the state in which it is executed, and that its purposes are confined to narrow geographical boundaries, and do not cover the whole world,[20] such purposes will be defined by the courts of the state in which it is executed;[1] and after this has been done an order

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[13] See Chapter two, Sections 55 to 57.

[14] 1916, **In re** Crum, 164 N. Y. Supp. 149, 152, 98 Misc. 160.

[15] 1904, Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393 (Affirming 126 Fed. 796).

[16] 1879, Draper v. Harvard College, 57 How. Prac. 269, 272 (N. Y.).

[17] 1901, **In re** Stewart, 26 Wash. 32, 34, 66 Pac. 148, 67 Pac. 723.

[18] 1891, Butler v. Green, 65 Hun. 99, 19 N. Y. Supp. 890, 895, 47 N. Y. St. Rep. 322 (Modifying 16 N. Y. Supp. 888).

[19] 1917, Sturm v. Stump, 239 Fed. 749, 753, 761.

[20] 1913, Fernald v. First Church of Christ Scientist in Boston, 77 N. H. 108, 88 Atl. 705.

[1] 1884, Pell v. Mercer, 14 R. I. 412, 446.

will be entered to transfer the property to the foreign state, which order will ordinarily close the proceedings in the state of execution. The courts of the state within which the charity is to be established will, thereupon, become the proper tribunals to provide for its due administration and proper application,[2] according to their own law.[3] This rule has been applied by the Georgia court in such a manner that an entire fund has been transferred to the proper trustee in England, though the testator had directed that only the income be so remitted.[4] The question of the validity of directions and conditions imposed by the testator as to holding, investing, accumulating and applying the gift, will ordinarily be settled according to the law of the state to which the gift has been sent,[5] which courts, however, if they find that they cannot give effect to the testator's intentions without violating such laws, may remit the property back to the state of his domicile which, thereupon, will administer its own law.[6]

§ 666. **Mortmain and Perpetuity Statutes.** It is not a part of the policy of any state to interdict either perpetuities or gifts in mortmain in another state.[7] The law against perpetuities is designed only to operate within state limits and is, therefore, not infringed where the property is to be removed beyond them.[8] A bequest which would be void as a perpetuity, if it were to be executed in the state where it is made, will, therefore, be valid and enforcible if it is to be executed in another state by whose laws it is valid.[9] The

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[2] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 432; 1881, Taylor v. Bryn Mawr College, 34 N. J. Eq. (7 Stew.) 101, 104. But see 1923, In re Donchian's Estate, 199 N. Y. Supp. 107, 120 Misc. 535 where the corporation named as recipient was a Massachusetts body with a branch in New York, and deceased had lived in New York, and difficulties in regard to the application of the charity were present, and a cy pres application was likely. In this case the court directed that the fund be retained in New York.

[3] 1874, Roy v. Rowzie, 66 Va. (25 Grat.) 599, 612.

[4] 1861, Silcox v. Harper, 32 Ga. 639, 652.

[5] 1879, Draper v. Harvard College, 57 How. Prac. 269, 271 (N. Y.); 1871, Manice v. Manice, 43 N. Y. 303, 387.

[6] 1893, Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407 (Rehearing denied 141 N. Y. 564, 568, 35 N. E. 1088).

[7] 1871, Chamberlain v. Chamberlain, 43 N. Y. 424, 434.

[8] 1898, Kurzman v. Lowry, 52 N. Y. Supp. 83, 85, 23 Misc. Rep. 380.

[9] 1905, Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359.

same holds good in regard to mortmain restrictions. It is as little a concern to a state that personal property of her citizens should pass to foreign corporations, as it is that it should pass to individuals living abroad.[10] Such a gift may be upheld if it is given to a foreign corporation, though it would be held to be void if a domestic corporation were the beneficiary.[11] Gifts of money to foreign corporations have been upheld, though such money was the result of a conversion of real estate situated in a state whose mortmain statute would have been violated if the gift had been made to a domestic corporation.[12] A mortmain statute, which imposes restrictions only on donors and not on donees, leaves foreign corporations free to take a bequest.[13]

§ 667. **Mortmain Provisions. Effect.** A gift of personal property made by a testator to a corporation in another state, which latter state only has a statute forbidding testators, who leave certain relatives, from willing more than a certain part of their property to charity, will raise no serious difficulty. The gift, being valid by the law of testator's domicile, is not invalidated by the fact that it would be void in part if it had been executed in such other state.[14] A different question arises where the situation is reversed and the statute is in force in the state of testator's domicile. In such case, the gift will be subject to the statute, and will be void in whole or part, except where foreign corporations are exempted from its provisions.[15] Where real estate is involved, the gift on well-known principles is subject to the law of the state where it is situated. The mere fact that the donor and his children are non-residents will be of no significance. If the state in which the land lies has a law which forbids a gift of more than a certain proportion of testator's property to charity, such law will apply, no matter where the

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10 1852, Vansant v. Roberts, 3 Md. 119, 129. But see 1878, Kerr v. Dougherty, 79 N. Y. 327.

11 1855, Thompson v. Swoope, 24 Pa. (12 Harris) 474, 482.

12 1868, American Tract Society v. Purdy, 3 Houst. 625 (Del.); 1881, Church Extension M. E. Church v. Smith, 56 Md. 362, 389.

13 1913, Pottsdown Hospital v. New York Life Insurance and Trust Co., 208 Fed. 196.

14 1871, White v. Howard, 38 Conn. 342, 359; 1880, Crum v. Bliss, 47 Conn. 592; 1909, Hagen v. Sacrison, 19 N. D. 160, 187, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

15 1884, Hollis v. Drew Theological Seminary, 95 N. Y. 166, 177.

donor or his heirs may live, or where the charity is to be administered.[16] Where, however, the property of a testator is scattered through a number of states, and his children have already received their full share of the entire estate out of the property situated in other states, they will not be allowed to claim the benefit of the mortmain provision as against a devise to charity made by the testator.[17]

§ 668. **Express Authority to take. New York.** The New York statute of wills prevents corporations from taking testamentary gifts of real estate unless they are "expressly authorized" by "charter or by statute to take by devise." This statute has given rise to two questions: 1, whether a foreign corporation, not expressly authorized to take by devise, can take land in New York under a will; 2, whether a New York corporation, not expressly authorized to take by devise, can take land in other states under a will. The first question can arise only in New York, and has been decided in the negative on the ground that any other holding would permit a corporation, to which the privilege of taking land by devise had been refused in New York, to acquire it by procuring a charter from another state.[18] Foreign corporations will not, by comity, be granted a greater and better title to take than is accorded to domestic corporations.[19] The second question can arise only outside of New York and has not been so easily answered. The Illinois court has overruled the contention that the New York statute only operates to impose a disability on devisors and not on devisees, and has held that it makes no difference whether the disability is contained in the charter or in the statute of wills, since the policy of the state is carried out as effectually in the one mode as in the other, and operates as a prohibition and a want of power, no matter how the disability is created. In consequence, a New York corporation not expressly authorized to take by devise has been held to be incapable to take Illinois land under an Illinois will.[20] This

[16] 1863, Paschal v. Acklin, 27 Tex. 173, 194, 195.

[17] 1863, Paschal v. Acklin, supra.

[18] 1871, White v. Howard, 46 N. Y. 144, 166.

[19] 1865, Levy v. Levy, 33 N. Y. 97, 124.

[20] 1874, Starckweather v. American Bible Society, 72 Ill. 50, 22 Am. Rep. 133.

view, however, has found no favor in the other courts. The Connecticut court has, therefore, decided that a New York corporation brings with it to Connecticut its charter, but not the New York statute of wills, and that there is an obvious distinction between an incapacity to take created by the statute of a state which is local and a prohibitory clause in the charter which everywhere clings to the corporation.[1] The Pennsylvania court has pointed out that such statute of wills does not operate beyond the state boundary, being intended to regulate merely the testamentary capacity of those subject to it, and to define the capacity of testators and not of corporations.[2] Similarly, the Ohio court has stated that the effect of such statute on the capacity of corporations to take is only incidental to the main purpose, and is limited to the state of New York.[3] There can be no question that the rule announced by these latter courts is the better one and should prevail over the contention of the Illinois court.

§ 669. **Summary.** Since charity is not limited by artificial state or national boundaries, questions of private international law very naturally arise in connection with charitable trusts. Where real estate is involved, the law of the state in which such real estate is situated will be the decisive factor. Where personal property is in question, the law of the donor's domicile will control, except in New York, whose courts, in an effort to escape from the narrow charity doctrine which at the time prevailed in the state, have made the law of the state to which it is destined the prevailing consideration. The charity itself, however, will be administered by the courts of the state, where it is to be established and will be governed thereby. It is no part of the policy of one state to interdict either perpetuities or gifts in mortmain in another state. A gift, which for such reasons would appear to be void by the law of the state of execution, if executed there, will not for that reason be declared invalid by the law of the state of the donor's domicile. Under the New York statute of wills, by which corporations cannot take

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[1] 1871, White v. Howard, 38 Conn. 342, 361.

[2] 1855, Thompson v. Swoope, 24 Pa. (12 Harris) 474, 480.

[3] 1864, American Bible Society v. Marshall, 15 Ohio St. 537.

by devise unless they are "expressly authorized" to do so "by charter or by statute," a foreign corporation will not be allowed to take real estate in New York unless it possesses such express authority. Whether a New York corporation, not expressly authorized to take by devise, can take land in other states under a will, has been answered in the negative by the Illinois and in the affirmative by the Connecticut, Pennsylvania and Ohio courts. The affirmative answer is not only supported by the greater weight of authority, but also by the better reasoning, and deserves to be the rule of decision in future lawsuits.

CHAPTER XVIII

TAX EXEMPTION

§ 678. **Old Practice.** Statutes, exempting charitable foundations from taxation, rest on reasons of policy and expediency which are sound and convincing,[1] and, therefore, such exemptions are hoary with age. Connecticut, in 1684, in virtually reënacting the Statute of Elizabeth,[2] enacted that charitable gifts were to be "free from the payment of rates."[3] This early statute has been followed by a host of exemption provisions in the various states too numerous to mention.

§ 679. **Religious Charities.** Perhaps the most interesting exemption statutes refer to religious charities and their church, school, cemetery, and parsonage properties. This part of our subject has had a most interesting history, and presents difficulties peculiar to itself. These difficulties have led to the adoption of constitutional provisions which, in turn, have been construed by the courts. A full treatment of the situation which has arisen in consequence would result in a separate chapter of something like fifty pages. Since such a chapter is contained in another work of the author,[4] it will not be attempted here. Any mention in the succeeding pages of religious charities will, therefore, be strictly incidental. The chapter, in its main phases, will be confined to the exemption of eleemosynary and educational charities.

§ 680. **Scope of Chapter.** It must not be supposed that exemptions are confined to charities in the technical or even the popular sense. They may, on the contrary, cover purely commercial ventures which it is thought expedient to help, just as infant industries have been aided by erecting tariff walls. It is not the purpose of this chapter to discuss the exemption extended to such industries. Our discussion will

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[1] See Section 693, infra.

[2] 1845, American Bible Society v. Wetmore, 17 Conn. 181, 187, 189. This statute was not printed until 1702, and hence is generally known as the statute of 1702.

[3] 1899, Yale University v. New Haven, 71 Conn. 316, 331, 42 Atl. 87, 43 L. R. A. 490.

[4] American Civil Church Law, Chapter 9, Pages 236-284.

be confined to institutions which, at the farthest, are analogous to charitable institutions.

§ 681. **Special Assessments.** Taxes must not be confounded with special assessments. The latter are merely payments for special benefits received, while the former are burdens, charges, or impositions placed on persons or property for general public uses. To exempt the property of a charitable institution from special assessments would either prevent all local improvements or, by law, force a contribution to them from the neighbors of such institutions. The various statutory exemptions, therefore, cover taxation, not assessments.[5] The Illinois court has even held that an exemption from special assessments is unconstitutional.[6]

§ 682. **License Fees.** Various forms of amusements are subject to license fees. The mere fact that a charity uses one of these forms as a means of raising money to be expended in charity will not exempt it. A city, therefore, has no power to relieve a camp association organized to care for needy ex-Confederate soldiers from a license fee for a street parade by a Mardi Gras company employed by the charity.[7]

§ 683. **Exemptions not Affected by Contract with Individual.** Exemptions are a matter between a charitable institution and the state. The fact, therefore, that a land contract entered into by a charitable society, and covering exempt property, provides that the buyer is to pay the taxes, does not affect the obligation of the land or its owner to the public.[8] A covenant by a charity mortgagor to a mortgagee, not to apply for any deduction by reason of the mortgage, is simply nugatory where its property is exempt from taxation.[9] A clause in a lease, by which the charity-lessee

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[5] 1891, Zable v. Louisville Baptist Orphan Home, 92 Ky. 89, 91, 17 S. W. 212, 13 L. R. A. 668, 13 Ky. Law Rep. 385; 1909, Gouverneur Village v. Gouverneur Cemetery Ass'n, 120 N. Y. Supp. 221, 136 App. Div. 37; 1915, Brooklyn Children's Aid Society v. Prendergast, 151 N. Y. Supp. 720, 166 App. Div. 852; 1909, Wey v. Salt Lake City, 35 Utah 504, 101 Pac. 381. See Zollmann's American Civil Church Law, Pages 250-252.

[6] 1885, Chicago v. Baptist Theological Union, 115 Ill. 245, 2 N. E. 254; 1886, University of Chicago v. People, 118 Ill. 565, 9 N. E. 189.

[7] 1911, Mobile v. Kiernan, 170 Ala. 449, 54 So. 102.

[8] 1894, Myers v. Akins, 8 Ohio Cir. Ct. Rep. 222, 231, 4 Ohio Cir. Ct. Dec. 425.

[9] 1899, Patterson Rescue Mission v. High, 64 N. J. Law 116, 123, 44 Atl. 974.

agrees to pay all taxes and assessments legally imposed upon the premises, does not impose liability where exemption existed before.[10] On the other hand, where a charity takes a deed, the grantor reserving a life estate, a provision that the grantor's occupation is to be free of taxes does not change the nature of her interest or estate so as to relieve the land from taxation.[11] Where real estate leased to a charitable institution is not exempt, the fact that the lessee has agreed to pay the taxes is immaterial. The lessor must pay so far as the public is concerned.[12]

§ 684. **No Exemption by Estoppel.** It sometimes happens that through one means or another an institution has enjoyed exemption to which it is not entitled. This fact will not estop the state from taxing it, though a building has been built on the faith that such unauthorized exemption will continue.[13]

§ 685. **Incorporation, Trustees, Foreign Corporations.** Incorporation will not generally be a prerequisite to exemption.[14] A building, to be exempt, need not be stamped with perpetuity. It is enough that its character is that of a public charity, whether it is created by charter, conveyance, articles of association, or voluntary rules and regulations.[15] The fact that the property is held by a trustee,[16] or is temporarily controlled by him,[17] is immaterial. The question

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[10] 1860, Sisters of Charity v. Detroit, 9 Mich. 94, 99.

[11] 1900, Bates v. Sharon, 175 Mass. 293, 56 N. E. 586.

[12] 1876, Humphries v. Little Sisters of the Poor, 29 Ohio St. 201, 207.

[13] 1895, Hibernian Benevolent Society v. Kelly, 28 Ore. 173, 197, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167.

[14] 1900, Montclair Military Academy v. Bowden, 64 N. J. Law 214, 47 Atl. 490.

[15] 1899, White v. Smith, 189 Pa. 222, 42 Atl. 125, 43 L. R. A. 498.

[16] 1900, Litz v. Johnson, 65 N. J. Law 169, 46 Atl. 776.

[17] 1904, Norton v. Louisville, 118 Ky. 836, 82 S. W. 621. See 1911, Burr v. Boston, 208 Mass. 537, 95 N. E. 208, 34 L. R. A. (N. S.) 143. But see 1900, McCullough v. Board of Review, 186 Ill. 15, 57 N. E. 837, 50 L. R. A. 517, holding that title in the bishop of the diocese is not sufficient to exempt a piece of property as the property of an institution of learning. Similarly, it has been held that, where a society formed to make navigation safe and to relieve distressed sailors and their families, takes a bequest for a church as trustee and erects such church, it stands toward such building in no other position than would an individual trustee, and that no exemption will be granted. 1892, Salem Marine Society v. Salem, 155 Mass. 329, 29 N. E. 584.

whether the exemption of charitable corporations are limited to domestic corporations has been decided in the negative by the Illinois court,[18] and in the affirmative by the New Jersey[19] and the Ohio courts.[20]

§ 686. **Rule of Strict Construction.** The rules formulated by the courts for the construction of exemption statutes are very important. Many pages could be filled with citations of cases which declare the general rule that exemption statutes are to be strictly construed.[21] "The fundamental rule pervading all exemptions from the general tax burdens of the state is that they are not favored by the law, and will not be construed to exist unless the statute invoked to support them expresses the legislative intention in clear and unmistakable terms."[1] The accepted canon of construction, therefore, is that exemptions are rigidly confined to the objects specifically designated. Courts will not permit sentiment to displace reason or policy to usurp the functions of authority.[2] This applies even to charitable institutions.[3]

§ 687. **Reasons for the Rule of Strict Construction.** Exemptions are an extraordinary grace of the sovereign power,[4] and, hence, in order to be effective, must appear clearly, either by the express words or the necessary intentment of the statute. This extraordinary grace is "in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for

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[18] 1877, People v. Western Seaman's Friend Society, 87 Ill. 246.

[19] 1916, Denville Twp. v. St. Francis Sanitarium, 89 N. J. Law 293, 98 Atl. 254. It has further been held that the fact that the title of a charity is in a trustee (the Redemptorist Fathers), which owes its corporate existence to the laws of a sister state, does not prevent exemption. 1900, Litz v. Johnson, 65 N. J. Law 169, 48 Atl. 776.

[20] 1922, Harvard College v. State, 106 Ohio St. 303, 140 N. E. 189.

[21] For a citation of a number of such cases see Zollmann's "American Civil Church Law," Pages 246-247. For a good illustration see 1854, Academy of Fine Arts v. Philadelphia, 22 Pa. (10 Harris) 496.

[1] 1917, Fairview Heights Cemetery v. Fay, 90 N. J. Law 427, 428, 101 Atl. 405 (Affirmed 91 N. J. Law 687, 688, 106 Atl. 891).

[2] 1883, State v. Board of Assessors, 35 La. Ann. 668, 671.

[3] 1882, Bangor v. Masonic Lodge, 73 Me. 428, 437, 40 Am. Rep. 369.

[4] 1880, New Orleans v. Campbell Manning, Unrep. Cas. 47 (La.); 1912, Milford v. Worcester County, 213 Mass. 162, 165, 100 N. E. 60.

the support of government."[5] Last but not least, the power to exempt as well as the power to levy taxes is an essential element of sovereignty and can be surrendered or diminished only by the plain and explicit terms of the written law.[6] "A grant of exemption from taxation, being in the nature of a renunciation of sovereignty, must, as a general rule, be construed most strongly against the grantee, and can never be permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require."[7] The personal property of a school is, therefore, clearly taxable where only its real estate is covered by the exemption statute.[8]

§ 688. **Illustrations of the Rule of Strict Construction.** There are many illustrations of this rule. Even an express provision in a special charter that such charter "shall be construed liberally" does not change it.[9] Where the statute exempts buildings and the ground which they shall "actually cover," a farm used as a school and hospital is exempt only in part.[10] Where buildings "with the land whereon the same are erected and which may be necessary for the fair enjoyment thereof" are exempted, adjoining land purchased after the buildings have been erected is not exempt.[11] Where buildings and the grounds attached thereto necessary for their proper occupancy are exempted, a further exemption in the same statute merely of a hospital exempts only the building and does not exempt a vegetable garden conducted by the hospital on the same ground for the use of its patients.[12] An act of Congress which exempts the "section"

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[5] 1919, Massachusetts General Hospital v. Belmont, 233 Mass. 190, 124 N. E. 21, 25.

[6] 1911, McCullough v. Bennett Medical College, 248 Ill. 608, 609, 94 N. E. 110, 140 Am. St. Rep. 237.

[7] 1904, Brenau Ass'n v. Harbison, 120 Ga. 929, 935, 48 S. E. 363.

[8] 1892, Kansas City v. Kansas City Medical College, 111 Mo. 141, 20 S. W. 35.

[9] 1898, People v. Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198; 1902, Chicago Theological Seminary v. Illinois, 188 U. S. 662, 23 S. Ct. 386, 47 L. Ed. 641 (Affirming 189 Ill. 439, 59 N. E. 977). Contra 1897, Brown University v. Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847.

[10] 1878, Frederick County v. Sisters of Charity, 48 Md. 34.

[11] 1907, Sisters of Charity v. Cory, 73 N. J. Law 699, 65 Atl. 500 (Reversing 72 N. J. Law 426, 61 Atl. 387).

[12] 1896, Thurston County v. Sisters of Charity, 14 Wash. 264, 44 Pac. 252.

on which a university stands, or any part of it which may remain as the "site" of an institution of learning, exempts only the 32 acres occupied by the campus of the school.[13] A law exempting property of whatever kind and description, belonging or appertaining to a seminary, exempts only property used in immediate connection with the seminary and not property held as an investment, though the proceeds are devoted to its educational purposes.[14] Where real estate, the income of which is used exclusively for the relief of indigent members of a fraternity, is exempt, rents transferred to the general funds of the fraternity are taxable.[15] A statute to conserve the Old South Meeting House in Boston, on account of the stirring scenes enacted within its walls which have made it a shrine, precious beyond price, to every lover of the Commonwealth, and to all who cherish the traditions of liberty, is concerned primarily with the building and only incidentally with the land upon which it stands.[16] Where a statute merely exempts from an inheritance tax land given for park purposes, a two million gift in money to embellish the park is not so exempt.[17] A law exempting universities, colleges, academies and schoolhouses does not cover an academy of fine arts. Says the court: "We make but indifferent progress in the improvement of our moral sentiments, if we desire to reach the pleasures and the profits of these refinements at the expense of others, whose tastes lead in a different direction, or whose circumstances preclude them from participating in such gratifications."[18]

§ 689. **Reasons for the Rule as applied to Charities.** It is clear, indeed, that the rule of strict construction is very appropriate as applied to railroads and other commercial enterprises. It is not without reasons, however, even in regard to charitable institutions. "The death grip of the church upon nearly all the land of Europe previous to the statutes

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[13] 1892, Ottawa University v. Franklin County, 48 Kans. 460, 29 Pac. 599.

[14] 1903, Chicago Theological Seminary v. People, 189 Ill. 439, 59 N. E. 977 (Affirmed 188 U. S. 662, 23 S. Ct. 386, 47 L. Ed. 641).

[15] 1917, People v. Cahoon, 166 N. Y. Supp. 347, 179 App. Div. 287.

[16] 1912, Old South Ass'n v. Boston, 212 Mass. 299, 99 N. E. 235.

[17] 1923, In re Frick's Estate, 277 Pa. 242, 121 Atl. 35.

[18] 1854, Academy of Fine Arts v. Philadelphia, 22 Pa. (10 Harris) 496, 499.

of mortmain, clearly illustrates the danger of too free exemption from taxation."[19]

§ 690. **Limitations of the Rule of Strict Construction.** It is very important not to misapply the rule and thus by too great a strictness strangle the purpose of the law-making power. Courts certainly are not at liberty to defeat the legislative intent by a strict construction[20] merely because they consider that the law is improper, for if they did, its meaning would depend, not upon its words, but upon the varying opinion of the various courts concerning its propriety, thus losing sight of the judicial duty of discovering the purpose of the lawmakers as declared, and faithfully to apply it.[21] Certainly, the language of the legislature, in exempting from taxation, is as much entitled to obedience as that imposing taxation.[22] Nor need the attention be exclusively riveted on the language. "The aphorism that exemptions are to be strictly construed is consistent with that reasonable construction that embraces incidents purely within the spirit, if not the terms, of the exception."[23] It certainly is not intended to station a tax-gatherer at the door of the human heart, and thus confine charity a prisoner in her own home.[1] Therefore, the rule of strict construction does not require a limitation of legislative terms to their narrowest meaning nor to any particular meaning.[2] "The theory, that the rule requiring strict construction of a tax exemption statute demands that the narrowest possible meaning should be given to words descriptive of the objects of it, would establish too severe a standard."[3] The rule, therefore, comes into play only when the legislative language, after analysis and subjection to the ordinary rules of interpretation, pre-

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[19] 1883, Haverford College v. Davis, 2 Del. County Rep. 33, 34 (Pa.).

[20] 1890, New Haven v. Sheffield Scientific School, 59 Conn. 163, 166, 22 Atl. 156.

[21] 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 521.

[22] 1889, Detroit Home and Day School v. Detroit, 76 Mich. 521, 525, 43 N. W. 593, 6 L. R. A. 97.

[23] 1898, State v. Parish of Orleans, 52 La. Ann. 223, 26 So. 872.

[1] 1907, Widows' and Orphans' Home v. Commonwealth, 126 Ky. 386, 397, 31 Ky. Law Rep. 775, 103 S. W. 354.

[2] 1922, State v. Scott, 91 W. Va. 513, 113 S. E. 907.

[3] 1921, In re Y. M. C. A. Assessment, 106 Neb. 105, 182 N. W. 593, 395.

sents ambiguity.[4] The possibility of a doubt is not sufficient to bring it into operation. It is out of such possibilities that controversies arise, and it is the duty of courts to ascertain by judicial interpretation, not whether a doubt can be asserted, but whether an ambiguity exists.[5] It does not imply that a contractual exemption "is to be disregarded, simply because it may be possible for a subtle mind to suggest a possible doubt as to the exemption, however conjectural may be the assumption on which the doubt is rested. Nor does the rule mean that, because it is deemed that a particular contract exemption was an unwise one for the public interest, therefore, the meaning of the contract is to be disregarded by a court in order to relieve the public from the burdens arising from the obligations of the contract."[6] The observation that the reason of the law is its life, so frequently helpful in the determination of questions arising at common law, must have a restricted application in the interpretation of statutes. Courts are not required or permitted to go beyond the plain meaning of the language which the legislature has used to express its intention.[7]

§ 691. **Limitations of the Rule. Constitutional Provision.** There is still another limitation of the rule. While a statutory exemption will be strictly construed, a constitutional limitation of the power of the legislature to exempt property will receive a liberal construction.[8]

§ 692. **Strict and Liberal Construction. Two Lines of Authority.** From the above reasoning, it is not many steps to a rule which is more or less the opposite from that with which we have started out. The consequence is that there are two lines of authorities.[9] Some cases hold that the rule of strict construction should be relaxed in dealing with the exemptions of the property of religious, eleemosynary, and

[4] 1910, St. John's Military Academy v. Edwards, 143 Wis. 551, 555, 128 N. W. 113, 139 Am. St. Rep. 1123.

[5] 1908, Northwestern University v. Hanberg, 237 Ill. 185, 189, 86 N. E. 734.

[6] White J. dissenting, 1902, Chicago Theological Seminary v. Illinois, 188 U. S. 662, 678, 23 S. Ct. 386, 47 L. Ed. 641.

[7] 1905, Little v. United Presbyterian Theological Seminary, 72 Ohio St. 417, 428, 74 N. E. 193.

[8] 1877, Philadelphia Library Co. v. Donohugh, 12 Phila. 284 (Affirmed and adopted 1878, Donohugh's Appeal, 86 Pa. (30 P. F. Smith) 306).

[9] 1918, Horton v. Colorado Springs Masonic Bldg. Soc., 64 Colo. 529, 173 Pac. 61.

educational institutions, because of their meritorious nature, and because they relieve the state of certain burdens.[10] Says the Utah court: "Statutes exempting property used for educational and charitable purposes or for public worship, under the great weight of authority, should receive a broad and more liberal construction than those exempting property used with a view to gain or profit only."[11] And the Vermont court concludes: "Reasons of public policy, no less potent than those requiring strict construction of statutes exempting from general taxation, demand liberality in dealing with exemptions relating to charitable legacies."[12]

§ 693. **Reasons for the Rule of Liberal Construction. Benefits to State.** It has been said that "the fundamental ground upon which all such exemptions are based is a benefit conferred upon the public by such institutions, and a consequent relief to some extent of the burden upon the state to care for and advance the interests of its citizens."[13] This reasoning certainly is sound. The benefits derived by the community at large from charitable institutions far outweigh the trivial inequality caused by an exemption of their property.[14] More than a fair equivalent for the exemption afforded to them is returned by their ultimate contribution to the public good.[15] "The very objects for which taxes are, in large part, assessed, are to carry on the educational and benevolent institutions of the state; and, hence, there is great propriety in avoiding, as the constitution does, the imposition of any taxation upon those agencies which are themselves employed in the very work to which the state applies so large a part of its revenues."[16] Exemptions, therefore, are not merely an act of grace on the part of the state, but stand squarely on state interest. To subject property

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[10] 1904, Brenau Ass'n v. Harbison, 120 Ga. 929, 935, 48 S. E. 363; 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522.

[11] 1911, Salt Lake Lodge v. Groesbeck, 120 Pac. 192, 194, Ann. Cas. 1914 B 940 (Utah). See 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400.

[12] 1915, In re Curtis, 88 Vt. 445, 450, 92 Atl. 965.

[13] 1892, M. E. Church South v. Hinton, 92 Tenn. 188, 190, 21 S. W. 321.

[14] 1904, Brenau Ass'n v. Harbison, 120 Ga. 929, 936, 48 S. E. 363.

[15] 1877, Hebrew Benevolent and Orphan Asylum v. New York, 11 Hun. 116, 118, 119 (N. Y.).

[16] 1898, Travelers' Insurance Co. v. Kent, 151 Ind. 349, 353, 50 N. E. 562, 51 N. E. 723.

of charitable institutions to taxation, would tend to diminish rather than increase the amount of taxable property, and would destroy the very life which produces a constant increase of taxable property as well as more valuable benefits. It has, therefore, been stated that it is really a misnomer to call the non-taxation of such property an exemption in favor of the entity in which the title is vested.[17]

§ 694. **Reason for Rule of Liberal Construction. Sense of Propriety.** The Missouri court argues that such exemptions should be attributed, not so much to a recognition of the value of charities to the state, but should be considered as the product of the sense of propriety and fitness in regard to places set apart and devoted to the relief of suffering, or the diffusion of light and knowledge among men. Says the court: "Being retreats, quiet and undisturbed, dedicated to noble purposes, the law should never manifest itself within their walls, but in acts of kindness and beneficence."[18] The property of the American Philosophical Society founded by Benjamin Franklin, and devoted to science and recognized as such by numerous legislative acts, has, therefore, been held to be exempt from taxation without any express legislative act.[19]

§ 695. **Rule of Liberal Construction as a Fact.** Whatever the reason, a relaxation of the rule of strict construction is a fact with which it is necessary to reckon. The courts, therefore, will not apply the same degree of strictness of construction in cases where charities and in cases where railroads or other commercial enterprises are involved.[20] They will not indulge in a severe literalism at the sacrifice of the spirit.[1] They will decline to apply the "severest tech-

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[17] 1899, Yale University v. New Haven, 71 Conn. 316, 332, 42 Atl. 87, 43 L. R. A. 490. Says the Court p. 329: "The non-taxation of public buildings is not the exception but the rule. The corporations, whether municipal or private, which own and are by law charged with the maintenance of such untaxed buildings, are not the recipients of special privileges, in any sense obnoxious to the law."

[18] 1852, Wyman v. St. Louis, 17 Mo. 335, 337.

[19] 1862, Philadelphia v. American Philosophical Soc., 42 Pa. (6 Wright) 9.

[20] 1914, Commonwealth v. Lynchburg Y. M. C. A., 115 Va. 745, 748, 80 S. E. 589, 50 L. R. A. (N. S.) 1197; 1889, State v. Fisk University, 87 Tenn. (3 Pickle) 233, 238, 241, 10 S. W. 284.

[1] 1903, Linton v. Lucy Cobb Institute, 117 Ga. 678, 681, 45 S. E. 53.

nical construction."[2] They will give a plain construction to the statute since, on the one hand, a law in the interest of learning should be liberally expounded, and on the other a law concerning exemptions should be strictly construed.[3] Says the Colorado court: "The meaning of the law must be ascertained by a construction within its spirit, purpose and policy not opposed to its letter."[4]

§ 696. **Rule of Liberal Construction. Examples.** Illustrations of liberal constructions adopted by courts to make effective the exemption intended to be granted are numerous.[5] The word "and" has been construed to mean "or" in such a statute.[6] A turner hall in which gymnastics are taught has been exempted as an "institution of learning."[7] A mausoleum has been held to be covered by the term graveyard.[8] An exemption of the capital stock of library institutions has been held to extend to the lot and building of the library.[9] Though the language of exemption statutes was limited to charitable corporations, organized under a certain act, it has been extended to all such corporations even though they were created before such act.[10] Towns authorized to establish and maintain libraries, schools, and homes have been held to be **pro tanto** charitable corporations.[11] A statute, allowing exemptions of five acres to charitable institutions, has been construed to allow five acres for each building which the institution owned, though such buildings were scattered over a 120 acre tract of land.[12] The words "the several lots whereon such buildings are situated" has, in the case of platted land, not been confined to the city lots on which

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[2] 1860, Sisters of Charity v. Detroit, 9 Mich. 94, 98.

[3] 1837, Kendrick v. Farquhar, 8 Ohio (8 Ham.) 189, 197.

[4] 1901, Cathedral of St. John v. Arapahoe County, 29 Colo. 143, 146, 68 Pac. 272.

[5] 1903, Linton v. Lucy Cobb Institute, 117 Ga. 678, 45 S. E. 53.

[6] 1916, Adams County v. Catholic Diocese, 110 Miss. 890, 896, 71 So. 17.

[7] 1904, German Gymnastic Ass'n v. Louisville, 117 Ky. 958, 80 S. W. 201, 25 Ky. Law Rep. 2105, 65 L. R. A. 120, 111 Am. St. Rep. 287.

[8] 1918, Gray v. Craig, 103 Kans. 100, 172 Pac. 1004.

[9] 1880, New Orleans Mechanics Soc. v. Harris, Manning, Unrep. Cas. 171 (La.).

[10] 1899, Johnson v. Mason Lodge, 106 Ky. 838, 844, 21 Ky. Law Rep. 493, 51 S. W. 620.

[11] 1920, **In re** Burnham, 183 N. Y. Supp. 539, 112 Misc. 560.

[12] 1896, Home for the Education of Feeble Minded Children v. Landis, 59 N. J. Law 343, 35 Atl. 906.

they stood, but has been construed to refer to the plot of ground on which the institution was situated, though this plot comprised fifty acres in the heart of New York City.[13] The exemption of school buildings has been construed to include the land on which they stand. Says the court: "They are not usually constructed upon wheels, or portable, to be pulled or packed from one tract of land to another as rapidly as the ownership of the foundation is changed by a tax sale. To exempt the building and not the land to which it is irrevocably fixed is a mockery."[14]

§ 697. **Special Charters. Liberal Provisions.** In the earlier times when the need for charitable institutions was greater than it is to-day, while their number was correspondingly smaller, it was customary to grant special charters to proposed charities, which in very broad language exempted such charities from taxation. The development of subsequent years has been less liberal. "The tendency of legislation, whether organic or ordinary, is to reduce and circumscribe exemptions from taxation to the narrowest possible limits, and even to totally abolish them. Each succeeding constitution of the several states of our country gives evidence of this tendency of modern thought."[15]

§ 698. **Special Charters. Liberal Provisions as Creating Contracts.** This development could not but raise the question whether these charters created contracts which could not be breached within the doctrine of the Dartmouth College case.[16] The attempts of Illinois and Louisiana to tax such charities in defiance of such provisions finally brought the question before the United States Supreme Court, which held that such charters created such contracts.[17] These de-

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[13] 1875, People v. New York, 6 Hun. 109 (N. Y.).

[14] 1883, Cassiano v. Ursuline Academy, 64 Tex. 673, 675.

[15] 1883, State v. Board of Assessors, 35 La. Ann. 668, 671. The constitution of 1879 substituted the words "actually used" for the words "exclusively used" found in the constitution of 1868. See also 1912, Bancroft Training School v. Haddonfield, 82 N. J. Law 192, 82 Atl. 20.

[16] 1819, Dartmouth College v. Woodward, 17 U. S. (4 Wheat) 518, 4 L. Ed. 629.

[17] 1878, University v. People, 99 U. S. 309, 25 L. Ed. 387. (Reversing 1875, Northwestern University v. People, 80 Ill. 333, 22 Am. Rep. 187.) 1881, Asylum v. New Orleans, 105 U. S. 362, 26 L. Ed. 1128. (Reversing 1879, New Orleans v. St. Louis Asylum, 31 La. Ann. 292.)

cisions have been followed by various state courts,[18] and have led the Illinois court to hold that the charter of Northwestern University, in exempting "all property of whatever kind or description owned by said corporation," applies to property of the corporation acquired both before[19] and after[20] the charter was granted. In New Jersey, the rule has even been extended to exemptions from special assessments.[21] Of course, where a special charter contains a provision by which the state retains the right to modify it, the above decisions do not apply.[22]

§ 699. **Special Charters. Offer and Acceptance. Consideration.** The mere enactment of a special charter containing provisions for exemptions is not sufficient. Such enactment "does not in and of itself amount to the making of a contract within the meaning of the federal constitution. In order to constitute a contract binding upon the state, there must be acceptance by the parties of the other part, accompanied by the passing of a consideration substantially in accordance with the terms of the charter."[1] This consideration has been stated to consist of the objects for which the corporation was created.[2] "The appreciation of the fact that education and refinement are more likely to go hand in hand with virtue, than are illiteracy and ignorance, that they best lead to good citizenship and the good order of the community, constitutes the consideration."[3]

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[18] 1889, County Commissioners v. Colorado Seminary, 12 Colo. 497, 21 Pac. 490; 1881, New Orleans v. Pydras Orphan Asylum, 33 La. Ann. 850; 1885, New Orleans Female Orphan Asylum v. Houston, 37 La. Ann. 68; 1879, Appeal Tax Court v. Baltimore Cemetery Co., 50 Md. 432; 1903, Morris v. Westminster College, 175 Mo. 52, 60, 74 S. W. 990; 1891, St. Vincent College v. Schaefer, 104 Mo. 261, 6 S. W. 395. But see 1875, New Orleans v. New Orleans Mechanics Society, 27 La. Ann. 436.

[19] 1903, In re Northwestern University Assessment, 206 Ill. 64, 69 N. E. 75.

[20] 1908, Northwestern University v. Hanberg, 237 Ill. 185, 86 N. E. 734.

[21] 1890, Mount Pleasant Cemetery v. Newark, 52 N. J. Law (23 Vroom) 539, 20 Atl. 832.

[22] 1895, Hartford v. Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483; 1904, Pratt Institute v. New York, 183 N. Y. 151, 75 N. E. 1119 (Affirming 91 N. Y. Supp. 136, 99 App. Div. 525).

[1] 1903, Cooper Hospital v. Camden, 68 N. J. Law 691, 696, 54 Atl. 419 (Reversing 68 N. J. Law 208, 52 Atl. 210).

[2] 1891, St. Vincent College v. Schaefer, 104 Mo. 261, 16 S. W. 395.

[3] 1907, Whitman College v. Berryman, 156 Fed. 112, 119.

§ 700. **Statutes do not Create Contracts.** What has just been said refers to special charters and not to other forms of legislation. A statute which provides that a poor farm owned by a city shall at all times be liable to taxation for township purposes may, therefore, be repealed by another statute exempting all lands used exclusively for charitable purposes.[4] A legislative act, which declares an institution to be free from taxation as long as it belongs to a hospital, may be repealed without breaching a contract. The withdrawal of a privilage is not the violation of a right.[5]

§ 701. **Charitable Purposes.** Statutory provisions generally exempt public or purely public charities, or property used or occupied, or exclusively used or occupied for charitable purposes, or held by or belonging to charitable institutions. It can admit of no doubt that the words "charitable purposes" must be construed according to the standards set by the statute of Elizabeth and its interpretations. The character of an institution is to be determined by its purposes and the manner of its operation,[6] and not by the opinion of any individual, expressed in a prospectus that its work is charitable.[7] Nor will the fact that an association's direct or indirect purposes or results are benevolence, charity, education or the promotion of science exempt it, since it is not organized chiefly or solely for one or more of these objects.[8] It follows that a Chautauqua property, used as such only a few days in the year and rented out the rest of the time, is not exempt as an "institution of education."[9] A hospital organized for profit is not exempt though its property is used exclusively for charitable purposes.[10] Of course, the charitable purposes must be of a lawful nature. A corporation which violates the mortmain statutes by holding more property than it is permitted to hold will not, as to such excess,

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[4] 1888, Williamson v. New Jersey, 130 U. S. 189, 9 S. Ct. 453, 32 L. Ed. 915.

[5] 1853, Appeal from Taxation, 1 Phila. 418, 421 (Pa.).

[6] 1923, Catholic Woman's Club v. Green Bay, —— Wis. ——, 192 N. W. 479.

[7] 1906, Cathedral St. John v. Denver, 37 Colo. 378, 86 Pac. 1021.

[8] 1897, Attorney General v. Detroit, 113 Mich. 388, 71 N. W. 632.

[9] 1901, Bosworth v. Kentucky Chautauqua Assembly, 112 Ky. 115, 65 S. W. 602, 23 Ky. Law Rep. 1393.

[10] 1909, People v. Ravenswood Hospital, 238 Ill. 137, 87 N. E. 305.

be exempted from taxation.[11] A lottery carried on for a charitable purpose will not receive more consideration.[12]

§ 702. **Purely Public Charities.** This term has given rise to considerable discussion.[13] The Oregon court, while admitting that a benevolent society is a charitable institution, has held that it is not exempt as a purely public charity.[14] Similarly, the Pennsylvania court has decided that an institute of science for the promotion and diffusion of general and scientific knowledge among the community at large, and the establishment and maintenance of a library and museum, whose benefits are restricted to its members except on certain conditions, is not a purely public charity.[15] The Delaware court has confined the meaning of the words to gifts for purposes purely public in the sense that the charity is conducted by public authorities and not by private foundations.[16] In this sense a poorhouse maintained by a poor district is certainly a purely public charity.[17] This limitation of the term has found some favor,[18] though the better opinion is opposed to it.[19] Accordingly, courts have exempted eleemosynary[20] and educational[1] charities, such as the great library of the Philadelphia Library Company founded by

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[11] 1910, Evangelical Baptist Benevolent and Missionary Society v. Boston, 204 Mass. 28, 90 N. E. 572.

[12] 1896, Seattle v. Chin Let, 19 Wash. 38, 40, 52 Pac. 324.

[13] 1892, M. E. Church South v. Hinton, 92 Tenn. 188, 191, 21 S. W. 321. Approved 1912, Cumberland Lodge v. Nashville, 127 Tenn. 248, 264, 154 S. W. 1141. See 1915, Myers v. Benjamin Rose Institute, 92 Ohio St. 238, 110 N. E. 929; 1918, Scott v. All Saints Hospital, 203 S. W. 146, 148 (Tex. Civ. App.).

[14] 1895, Hibernian Benevolent Society v. Kelly, 28 Or. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167. See 1884, Petersburg v. Petersburg Benevolent Mechanics Ass'n, 78 Va. 431.

[15] 1880, Delaware County Institute v. Delaware County, 94 Pa. 163.

[16] 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 374, 77 Atl. 565.

[17] 1888, Armstrong v. Kittanning Borough, 2 Monag. 316, 15 Atl. 892 (Pa.); 1886, Cumru Twp. v. Directors of Poor, 112 Pa. 264, 3 Atl. 378.

[18] 1883, Haverford College v. Davis, 2 Del. County Rep. 33 (Pa.); 1904, Commonwealth v. Thomas, 119 Ky. 208, 83 S. W. 572, 6 L. R. A. (N. S.) 320; 1881, Miller's Appeal, 10 Wkly. Notes Cas. 168 (Pa.).

[19] 1878, Donohugh's Appeal, 86 Pa. (30 P. F. Smith) 306, 318. See 1878, Delaware County v. Sisters of St. Francis, 2 Del. County Rep. 149, 151 (Pa.).

[20] 1876, Humphries v. Little Sisters of the Poor, 29 Ohio St. 201, 206.

[1] 1874, Gerke v. Purcell, 25 Ohio St. 229, 247.

Benjamin Franklin,[2] on the ground that they are purely public charities, though they rest on private foundations.

§ 703. **Purely Public Charities. Small Class of Beneficiaries.** The fact that the beneficiaries of a charity are confined to a small class is no objection. "The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind."[3] Even denominational lines may, therefore, be drawn in creating a class of beneficiaries.[4]

§ 704. **Purely Public Charities. Denominational Control.** The management of some of the largest hospitals, homes, and schools has, by design or accident, fallen into the control of persons belonging to a particular denomination. So prevalent is this situation that, where the contrary is true, the charity is likely to announce the fact that it is unsectarian.[5] Such denominational control is of no consequence. Purely public charities are neither so abundant nor so effective that we can afford to discriminate against them because of the creed of their managers.[6] "The time has not yet arrived when a benevolent enterprise is to be treated as less of a charity or less worthy of state aid or favor because it is founded upon the principles and animated with the spirit of a Christian faith."[7]

§ 705. **Held by or Belonging to a Charitable Institution.** This form of exemption statutes is infrequent. The word "held" had been construed to imply that it is not necessary that the property be used for the charitable purposes in order to be exempt.[8] The word "belonging" has been con-

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[2] 1877, Philadelphia Library Co. v. Donohugh, 12 Phila. 284 (Affirmed and adopted 1878, Donohugh's Appeal, 86 Pa. (30 P. F. Smith) 306).

[3] 1877, Philadelphia Library Co. v. Donohugh, 12 Phila. 284, 288. See previous note.

[4] 1879, Burd Orphan Asylum v. School District, 90 Pa. 21.

[5] 1897, Haverford College v. Rhoads, 6 Pa. Super Ct. 71, 86.

[6] 1899, White v. Smith, 189 Pa. 222, 42 Atl. 125, 43 L. R. A. 498.

[7] 1887, Academy of Protestant Episcopal Church v. Hunter, 4 Pa. Co. Ct. Rep. 66, 72 (Affirmed 150 Pa. 565, 25 Atl. 55).

[8] 1909, Wey v. Salt Lake City, 35 Utah 504, 101 Pac. 381.

strued to cover a long term lease[9] and to exempt property though it is rented out.[10] Under such a provision, property owned by an individual is not tax-free, though used exclusively for charitable purposes, since it cannot be said to belong to a charitable institution.[11]

§ 706. **Used or Occupied or Exclusively Used or Occupied.** The word "used" plainly makes the use of the property, not its ownership, the criterion.[12] The use of the word "exclusive" in connection with it, of course, is not unimportant.[13] Property or a building might actually be used for school purposes, and yet not be used exclusively.[14] Where, therefore, a constitution exempts property **exclusively** used for charitable purposes, a complaint seeking to restrain taxation on the ground that the property is used (not saying exclusively) is demurrable.[15] In every case it is the use, not the title, which is decisive.[16] The mere ownership of land by a charitable institution will, therefore, not exempt it. The exemption depends upon its actual devotion to the work of the institution.[17] The deed or record title need not show the use.[18] On the other hand, land still occupied by the charity may be exclusively used by it for charitable purposes though it has been sold on land contract.[19] The same is true

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[9] 1860, Sisters of Charity v. Detroit, 9 Mich. 94, 96. One-half of the court dissented, resulting in the affirmance of the judgment below. But see 1911, McCullough v. Bennett Medical College, 248 Ill. 608, 94 N. E. 110, 140 Am. St. Rep. 237.

[10] 1910, New Castle Common v. Megginson, 24 Del. (1 Boyce) 361, 77 Atl. 565.

[11] 1900, Engstad v. Grand Forks County, 10 N. D. 54, 84 N. W. 577.

[12] 1909, Anniston City Land Co. v. State, 160 Ala. 253, 48 So. 659; 1922, In re Central Union Conference Ass'n, —— Neb. ——, 189 N. W. 982; 1922, In re St. Elizabeth Hospital, —— Neb. ——, 189 N. W. 981.

[13] 1904, Curtis v. Androscoggin Lodge, 99 Me. 356, 358, 59 Atl. 518.

[14] 1883, State v. Board of Assessors, 35 La. 668, 669.

[15] 1920, Grand Lodge v. Taylor, 146 Ark. 316, 226 S. W. 129.

[16] 1912, Corporation Commission v. Oxford Seminary Construction Co., 160 N. C. 582, 76 S. E. 640.

[17] 1903, Cooper Hospital v. Camden, 68 N. J. Law 691, 707, 54 Atl. 419 (Reversing 68 N. J. Law 208, 52 Atl. 210).

[18] 1886, Willard v. Pike, 59 Vt. 202, 220, 9 Atl. 907.

[19] 1894, Myers v. Aikins, 4 Ohio Cir. Ct. Dec. 425, 8 Ohio Cir. Ct. Rep. 222. The converse, of course, is not true. 1908, People v. St. James Xavier Female Academy, 233 Ill. 26, 34, 84 N. E. 55. In this case the court held that land taken for a school by a trust company and held until the school should be in position to pay for it is not exempt. It is like land bought on land contract.

of the word "occupied." While there is a difference between the two words,[20] the word "occupied" is not employed "in the general sense in which a corporation or individual may be said to occupy their real estate when it is not occupied by anyone else, but in the sense in which an incorporated college, academy, hospital or like institution, occupies its college, academy or hospital, and the lands and buildings connected therewith."[21]

§ 707. **Charitable Institutions. How Created. Character and Property.** The word "institution" calls for some explanation. It may conceivably mean either a mere organization, or its property. It is clear that it does not mean the former. The duty to tax as well as the authority to exempt has reference to property. It is property alone that is required to be taxed, and property also is the object of the authorized exemption.[22] "A charitable institution as an organization is neither taxed nor exempted; it is simply ignored as a subject of taxation. So long as it is a mere spirit, its existence is undistinguished from that of other incorporeal beings. To be recognized, it has to 'materialize'."[1] Though the Illinois court has held that the idea of ownership can only be connected with an institution through the interposition of either a society, or a corporation, or a trust,[2] other courts have decided that ownership by an individual may be sufficient.[3] The institution need not have actually begun to dispense charity.[4] Its character may vary from a missionary society[5] to a medical[6] or other school.[7] The amount of property exempted will depend upon the

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[20] 1899, Willamette University v. Knight, 35 Or. 33, 56 Pac. 124.

[21] 1884, Lynn Workingmen's Aid Ass'n v. Lynn, 136 Mass. 283, 285.

[22] 1874, Gerke v. Purcell, 25 Ohio St. 229, 244.

[1] 1887, Academy of Richmond County v. Bohler, 80 Ga. 159, 162, 7 S. E. 633.

[2] 1889, Montgomery v. Wyman, 130 Ill. 17, 22, 22, N. E. 845.

[3] 1887, Academy of Richmond County v. Bohler, 80 Ga. 159, 161, 7 S. E. 633; 1913, Ward Seminary v. Nashville, 129 Tenn. 412, 167 S. W. 113. See 1908, Jackson v. Preston, 93 Miss. 366, 47 So. 547.

[4] 1921, State v. Settegast, —— Tex. Civ. App. ——, 227 S. W. 253. But see 1922, In re Allerton, 296 Ill. 340, 129 N. E. 807.

[5] 1875, Maine Baptist Missionary Convention v. Portland, 65 Me. 92.

[6] 1908, Cook County v. Chicago Polyclinic, 233 Ill. 268, 271, 84 N. E. 220.

[7] 1908, People v. St. Francis Xavier Female Academy, 233 Ill. 26, 33, 84 N. E. 55.

particular statute. In Kentucky, the word "institution" has been held to include even such property of a charity as has been let for profit.[8] A fund bequeathed by a testator has of itself been held to be an institution exempt from taxation. Says the court: "Buildings alone, and the grounds upon which they stand, are not adequate to provide education. In addition, money must be used to employ teachers, provide textbooks, etc."[9]

§ 708. **Property Leased for Profit. General Reasoning.** The Kentucky court has held that property of a charity let for profit, which profit is used for its charitable purposes, is exempt as exclusively used for charitable purposes.[10] This decision is unsound. The law looks at the property as it finds it in use and not to what is done with its accumulations.[11] The purposes mentioned in the statute refer to the direct and immediate result of the occupation of it, and not to the consequential benefit to be derived from its use.[12] There is a very material difference between the use of a building exclusively for charitable purposes and letting it and applying the proceeds arising therefrom to such purposes.[13] "In so far as such organizations are administrators and disbursers of purely public charity, their property permanently in use for that purpose is exempt from taxation; but, in so far as they are capitalists or proprietors engaged in acquiring money or effects to be so disbursed, property of any and every kind from which their income is derived is subject to be taxed the same as property generally."[14]

§ 709. **Property Let for Profit. Analogy to Property of an Individual.** It is well settled that an individual cannot

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[8] 1915, Commonwealth v. Board of Education M. E. Church, 166 Ky. 610, 179 S. W. 596.

[9] 1903, Commonwealth v. Gray's Trustees, 115 Ky. 665, 668, 74 S. W. 702, 25 Ky. Law Rep. 52.

[10] 1891, Henderson v. Strangers' Rest Lodge, 17 Ky. Law Rep. 1041, 17 S. W. 215; 1896, Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 19 Ky. Law Rep. 1091, 36 S. W. 921, 40 L. R. A. 119; 1907, Commonwealth v. Hamilton College, 125 Ky. 329, 101 S. W. 405; 1918, Church of Good Shepard v. Commonwealth, 180 Ky. 465, 202 S. W. 894.

[11] 1880, Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253, 258.

[12] 1904, Emerson v. Milton Academy, 185 Mass. 414, 70 N. E. 442.

[13] 1900, Fitterer v. Crawford, 157 Mo. 51, 64, 57 S. W. 532, 50 L. R. A. 191.

[14] 1888, Massenburg v. Grand Lodge, 81 Ga. 212, 218, 7 S. E. 636.

exempt his property from taxation simply by the exclusive use of its income for charitable purposes. Such use is a matter which appeals to his own individual spirit of benevolence. It may be given to-day and withheld to-morrow.[15] A charitable institution is in no better position.[16] The fact that the proceeds of its property are applied to its charitable purposes,[17] or the improvement of its campus,[18] is immaterial. "The state cannot discriminate between the uses which different societies or individuals will make of their business, and determine that this society or individual makes a more worthy disposition of the proceeds of his business than that, and, therefore, the one shall be taxed and the other not."[19] A mere intention later to use property leased for commercial purposes for the promotion of its charitable undertakings does not affect the question.[20] Even the adoption of an ambulatory resolution, to devote to charitable uses the income of a property after the building on it is paid for, does not constitute a present sequestration of it to those uses, for it is merely a thing in expectancy which may never become a thing in possession.[1]

§ 710. **Property Let for Profit. Other Reasons.** There are other reasons for the distinction between property used for the purpose of exercising the charitable purposes of the institution and property yielding a revenue to its coffers.[2] Charity is not an instrument for gathering together but for scattering abroad. Its appropriate office is not to acquire money but to apply and administer it. This distinction has been constantly felt though perhaps not often formulated in words. It "is the key to the policy which puts productive

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[15] 1907, Hot Springs School District v. Sisters of Mercy, 84 Ark. 497, 499, 106 S. W. 954.

[16] 1888, Massenburg v. Grand Lodge, 81 Ga. 212, 218, 7 S. E. 636; 1918, Odd Fellows Building Ass'n v. Naylor, 53 Utah 111, 177 Pac. 214.

[17] 1895, Hibernian Benevolent Society v. Kelly, 28 Or. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167.

[18] 1899, Willamette University v. Knight, 35 Or. 33, 56 Pac. 124.

[19] 1878, Phillips Exeter Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589, 592; 1850, Cincinnati College v. State, 19 Ohio 110, 114.

[20] 1900, Y. M. C. A. v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123.

[1] 1911, Grand Lodge v. Burlington, 84 Vt. 202, 210, 78 Atl. 973.

[2] 1860, New Orleans v. Congregation Dispersed of Judah, 15 La. Ann. 389.

property, when held for charity, on a different footing from non-productive."[3] Property used to produce income to be expended in charity is too remote from the ultimate charitable object to be exempt.[4] It is also but reasonable to presume that the lawmakers considered that property which is producing an income can bear a tax.[5] The analogy with income producing public property does not bear analysis. "Public property, when productive, yields public income to the state, the county, the city, or the town; but all other property enumerated is either private or corporate, and if it yields income at all, it is either private or corporate income. Public property is not taxed, whether income be derived from it or not; but private or corporate property, though it be connected with the external, visible 'institution,' is not exempt if used for income, since the income from such property must, by reason of its ownership, be either private or corporate, these terms being comprehensive enough to include all income whatsoever that is not public."[6] Property let by a charity, therefore, is taxable, though the lease expires only one day after the tax becomes effective and though the charity is ready immediately to move into the building.[7] Land exempt in the hands of a charity becomes taxable where it is leased to an individual with the obligation to erect a building thereon.[8] Even the fact that the rent is only nominal has been held not to exempt the property.[9]

§ 711. **Work by Beneficiaries.** Practically all the trained nurses of the country are produced by a system of education according to which the student nurses perform work and in return receive board, room, training, and sometimes a small

[3] 1888, Massenburg v. Grand Lodge, 81 Ga. 212, 220, 7 S. E. 636.

[4] 1887, Academy of Richmond County v. Bohler, 80 Ga. 159, 164, 7 S. E. 633.

[5] 1887, Morris v. Lone Star Chapter, 68 Tex. 698, 704, 5 S. W. 519.

[6] 1887, Academy of Richmond County v. Bohler, 80 Ga. 159, 163, 7 S. E. 633.

[7] 1895, Board of Home Missions v. New York, 37 N. Y. Supp. 96, 91 Hun. 642. See also 1875, New Orleans v. New Orleans Mechanics Society, 27 La. Ann. 436; 1904, Pratt Institute v. New York, 183 N. Y. 151, 75 N. E. 1119 (Affirming 91 N. Y. Supp. 136, 99 App. Div. 525). Compare 1866, Muhlenberg Twp. v. Charles Evans Cemetery Co., 1 Woodw. Dec. 323 (Pa.) which holds that an exemption statute is not retroactive as to taxes already assessed.

[8] 1882, People v. Brooklyn, 27 Hun. 559 (N. Y.).

[9] 1911, Centenary College v. Hubbs, 128 La. 257, 54 So. 790.

money allowance. The existence of such a training school does not deprive a hospital of its charitable character.[10] The same is true where a university conducts a farm and gives credit to its students for work performed thereon.[11] The principle certainly holds good in regard to charities whose object it is to salvage the jetsam and flotsam of humanity and which provide employment as a means of reformation, though also to enable them to carry on their work. A house of refuge for the reformation of juvenile delinquents which maintains workshops, gardens, and farms, in order to provide the work so necessary to its beneficiaries has, therefore, been exempted from taxation.[12] A rescue mission which operates a wood-splitting outfit at which its beneficiaries are required to work, and which sells the kindling wood thus produced, is used exclusively for charitable purposes. Says the court: "An association established and sustained by voluntary contributions from the charitable, whose object is to furnish food, lodging, and clothing to the needy, requiring work in aid of the charity from those who are able to work, discouraging idleness and begging from door to door, with religious services for those who choose to attend, is preeminently a charity."[13]

§ 712. **Salaried Employees. Limitation Imposed on Physicians.** Most charities require the services of a more or less trained personnel. This cannot be maintained without the payment of salaries. That such salaries are paid is no ground to deny exemption.[14] Even the fact that such salary is placed on a commission basis, does not necessarily spell taxation for the institution.[15] A pension granted to such employees does not provide for pecuniary profits to them so as to make the institution taxable, but is in the nature

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[10] 1907, Sisters of Third Order v. Peoria County, 231 Ill. 317, 83 N. E. 272

[11] 1889, State v. Fisk University, 87 Tenn. (3 Pickle) 233, 10 S. W. 284. See 1883, Thiel College v. Mercer County, 101 Pa. 530.

[12] 1891, House of Refuge v Smith, 140 Pa. 387, 21 Atl. 353.

[13] 1916, Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N. E. 606; 1899, Patterson Rescue Mission v. High, 64 N. J. Law 116, 123, 44 Atl. 974.

[14] 1899, Patterson Rescue Mission v. High, 64 N. J. Law 116, 122, 44 Atl. 974; 1922, Hart v. Taylor, 301 Ill. 344, 133 N. E. 857.

[15] 1903, Linton v. Lucy Cobb Institute, 117 Ga. 678, 45 S. E. 53.

of a reasonable compensation for the services rendered by them.[16] Of course, where an institution is so conducted as to result in a large benefit to some favored employee or employees, it becomes subject to taxation.[17] The mere fact that only physicians who subscribe to and are governed by the principles of medical ethics promulgated by the American Medical Association are permitted to practice in a hospital, does not affect its charitable character. Such character "depends not at all upon what class of physicians are permitted to practice there, so long as the institution is not conducted for the purpose of benefiting the physicians of that class."[18]

§ 713. **Payments by Beneficiaries as the Dominant Feature.** The question whether an institution which collects payments from its pupils, patients, or other beneficiaries is exempt as a purely public charity, or is used exclusively for charitable purposes, is a serious one. A school certainly is stamped with commercialism, and hence is taxable, where it charges tuition and board fixed without reference to the actual cost of instruction,[19] or receives from tuition an income very much in excess of its disbursements,[20] or wholly sustains itself by tuition and the labor of its students,[21] or charges tuition equal to that of commercial institutions.[1] It has even been held that a school which is mainly maintained by such tuition is not a public charity "maintained by public or private charity."[2] That some pupils[3] are educated, or some patients[4] treated free of charge, will not restore the

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[16] 1917, People v. Keys, 165 N. Y. Supp. 863, 178 App. Div. 677.

[17] 1898, State v. Parish of Orleans, 52 La. Ann. 223, 26 So. 872.

[18] 1907, Sisters of Third Order v. Peoria County, 231 Ill. 317, 323, 83 N. E. 272.

[19] 1898, Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783.

[20] 1908, Mercersburg College v. Poffenberger, 36 Pa. Super. Ct. 100.

[21] 1883, Thiel College v. Mercer County, 101 Pa. 530.

[1] 1923, Carteret Academy v. State Board, —— N. J. ——, 120 Atl. 736.

[2] 1888, Appeal of Philadelphia, 15 Atl. 683 (Pa.).

[3] 1904, Harrisburg v. Harrisburg Academy, 26 Pa. Super. Ct. 252; 1908, Mercersburg College v. Poffenberger, 36 Pa. Super. Ct. 100. But see 1892, Episcopal Academy v. Philadelphia, 150 Pa. 565, 25 Atl. 55; 1895, Philadelphia v. Overseers of Public Schools, 170 Pa. 257, 32 Atl. 1033, 29 L. R. A. 600.

[4] 1918, Vicksburg v. Vicksburg Sanitarium, 117 Miss. 709, 78 So. 702.

exemption. The dominant purpose being of a commercial nature, any incidental charity administered is too remote to bring the institution within the exemption. It follows that a dispensary, established to make a commercial medical college more attractive to its students, is not exempt as a purely public charity, though no charge is made to patients unable to pay.[5]

§ 714. **Incidental Payment by Beneficiaries.** A different situation exists where the dominant purpose is charity, though tuition or other payments are received. If such payments do not result in private gain, the charitable character of the institution is not affected. An institution which admits, cares for, and gives medical aid to the pauper as well as the prince, without private gain to itself, is certainly a charity in the fullest sense.[6] No side of human misery is so dark as that illustrated by these utterly helpless unfortunates, and the hand that ministers to them surely is stretched forth in pure humanity when no gain touches its palm. We cannot refuse the badge of charity to an institution which, without private profit or selfish end, succors and cares for these saddest of afflicted mortals, even though the mere cost of maintenance should be charged in each case to the patient.[7] Says the Missouri court: "Must we hold that if the community raise money by begging, their purposes are purely charitable; but if they work to support themselves while ministering to the sick, and to support the sick to whom they minister, the character of the charity is impaired?"[8] The fact, therefore, that a hospital is not used exclusively for free patients does not change its character as a charity.[9] That there is an income from the beneficiaries which is used for charitable purposes, does not make the institution taxable

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[5] 1901, Gray Street Infirmary v. Louisville, 23 Ky. Law Rep. 1274, 65 S. W. 11, 55 L. R. A. 270; 1905, Wathen v. Louisville, 27 Ky. Law Rep. 635, 85 S. W. 1195.

[6] 1918, Lutheran Hospital Ass'n v. Baker, 40 S. D. 226, 235, 167 N. W. 148.

[7] 1890, Philadelphia v. Pennsylvania Hospital, 8 Pa. Co. Ct. Rep. 72, 74.

[8] 1881, State v. Powers, 10 Mo. App. 263, 266 (Affirmed 74 Mo. 476).

[9] 1916, Reynolds Memorial Hospital v. Marshall County, 78 W. Va. 685, 690, 90 S. E. 238.

as being conducted for profit.[10] "That the institution receives a revenue from the recipients of its bounty, sufficient to keep it in operation, does not take from it its character as a purely public charity, where it was founded and endowed as such, and when all of the receipts go to providing for the purposes for which it was erected and maintained."[11] Though only a small percentage of the beneficiaries of a hospital are charity patients, the institution is exclusively used for charitable purposes where it is administered by a sacred order and no one receives any pecuniary profit out of it.[12] The contention that such payments affect the institution's charitable character has, therefore, universally been overruled.[13]

§ 715. **Payments by Beneficiaries. Advantages.** Such payments result in other advantages. "The fact that paying patients are taken, the profits derived from attendance upon these patients being exclusively devoted to the maintenance of the charity, seems rather to enhance the usefulness of the institution to the poor; for it is a matter of common observation amongst those who have gone about at all amongst the suffering classes, that the deserving poor can with difficulty be persuaded to enter an asylum of any kind confined to the reception of objects of charity; and that their honest pride is much less wounded by being placed in an institution in which paying patients are also received."[14]

§ 716. **Payments by Beneficiaries. Apportionment.** Courts have listened with impatience to the argument sometimes advanced that the profit producing part of a charitable

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[10] 1916, Denville Twp. v. St. Francis Sanitarium, 89 N. J. Law 293, 98 Atl. 254.

[11] 1915, Dayton v. Speers Hospital, 165 Ky. 56, 62, 176 S. W. 361; 1892, Episcopal Academy v. Philadelphia, 150 Pa. 565, 574, 25 Atl. 55. See 1904, Harrisburg v. Harrisburg Academy, 26 Pa. Super Ct. 252.

[12] 1922, In re St. Elizabeth Hospital, —— Neb. ——, 189 N. W. 981.

[13] 1907, Hot Springs School District v. Sisters of Mercy, 84 Ark. 497, 106 S. W. 954; 1906, Cathedral St. John v. Denver County, 37 Colo. 378, 386, 86 Pac. 1021; 1908, German Hospital v. Cook County, 233 Ill. 246, 84 N. E. 215; 1915, Mason County v. Hayswood Hospital, 167 Ky. 17, 179 S. W. 1050; 1880, Hennepin County v. Brotherhood Gethsemane, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298; 1918, Scott v. All Saints Hospital, 203 S. W. 146, 149 (Tex. Civ. App.); 1923, St. Albans Hospital v. Town of Enosberg, —— Vt. ——, 120 Atl. 97.

[14] 1881, State v. Powers, 10 Mo. App. 263, 267 (Affirmed 74 Mo. 476).

institution should be separated from the other part. The Pennsylvania court has, therefore, held that a hospital, which maintains one of its buildings for the use of its wealthier patients but uses the profits derived therefrom for its general purposes, is exempt in its entirety.[15] The lower court in this case had said: "It is manifestly absurd, and would be unjust to the institution, in determining its character, to separate it into parts and except out of its vast and varied system of humane service any particular department, house or class of patients, for independent characterization. All of its property is undoubtedly used in the line of the charitable purpose of its incorporation, and the ultimate test of its character must be the result of its work as a whole."[16] Nor will there be an apportionment of the classes of beneficiaries so that, if the number of paying patients preponderates, the exemption fails.[17] A hospital whose charity patients number only about five per cent is exempt so long as it uses all the money received for its charitable purposes. The disparity argument is unavailing so long as charity is dispensed to all who apply and are in need of it, and no profit is made or obstacle placed in their way.[18] Of course, where a statute requires the use of a certain proportion of the beds for charity cases, the situation is different, and the hospital will not be exempt unless it fulfills the statutory requirements.[19]

§ 717. **Payments by Beneficiaries. Surplus Receipts. Sanitarium.** That a large class of pay patients use a hospital merely as a sanitarium, does not prevent exemption.[20] Even the fact that such payments have at times resulted in a surplus is immaterial. Says the Wisconsin court: "It is the very fact that pay is collected from those who can pay

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[15] 1893, Philadelphia v. Pennsylvania Hospital, 154 Pa. 9, 25 Atl. 1076.

[16] 1890, Philadelphia v. Pennsylvania Hospital, 8 Pa. Co. Ct. Rep. 72, 73.

[17] 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 343, 91 N. E. 385.

[18] 1907, Sisters of Third Order v. Peoria County, 231 Ill. 317, 322, 83 N. E. 272.

[19] 1919, Massachusetts General Hospital v. Belmont, 233 Mass. 190, 124 N. E. 21. See 1919, New England Sanitarium v. Stoneham, 233 Mass. 171, 124 N. E. 29.

[20] 1910, New England Sanitarium v. Stoneham, 205 Mass. 335, 91 N. E. 385.

which enables the Sisters to operate the hospital and care for those who are too poor to pay."[21]

§ 718. **Tuition and Other Payments.** What is true of hospitals holds good in regard to schools. Schools, though they charge tuition, give more than they receive. They generally make up for the failure of the tuition fees to pay the actual costs by the self-sacrificing devotion of their teachers and the bounty of living donors or past generations. The mere taking of tuition, therefore, does not strip them of their charitable character.[22] "When a college or academy is incorporated wholly for the purposes of general education, and is so operated without any capital stock or purpose of profit, and tuition is charged only for its maintenance, then it is devoted to public use."[1] It follows that an educational institution is not subject to taxation merely because it charges a nominal tuition fee.[2] A denominational school, which gives free tuition and textbooks to poor pupils, and charges tuition to others only to cover its expenses, is exempt as being used exclusively for school purposes.[3] The words "not leased or otherwise used with a view to profit" do not forbid tuition on pain of losing the exemption even though the school is carried on by an individual.[4] That a small fraction of its annual cost is paid by tuition fees, is not enough to make an institution taxable.[5] That some students pay more than others at a school dormitory, does not make such school a commercial institution.[6] That such dormitories are away from the main campus, does not make them taxable.[7] That

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21 1897, St. Joseph's Hospital Ass'n v. Ashland County, 96 Wis. 636, 640, 72 N. W. 43.

22 1909, Institute of Holy Angels v. Bender, 79 N. J. Law 34, 74 Atl. 251. Approved 1914, Montclair v. State Board of Equalization, 86 N. J. Law 497, 92 Atl. 270 which was affirmed 88 N. J. Law 374, 96 Atl. 589; 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 374, 204 App. Div. 664.

1 1886, Willard v. Pike, 59 Vt. 202, 216, 9 Atl. 907.

2 1905, Brewer v. American Missionary Ass'n, 124 Ga. 490, 52 S. E. 804.

3 1884, Phillips v. Sister Estelle, 42 Ark. 536. 1887, Academy of Protestant Episcopal Church v. Hunter, 4 Pa. Co. Ct. Rep. 66 (Affirmed 150 Pa. 565, 25 Atl. 55).

4 1893, Ramsey County v. Stryker, 52 Minn. 144, 53 N. W. 1133.

5 1889, Northhampton County v. Lafayette College, 128 Pa. 132, 147, 18 Atl. 516.

6 1899, Yale University v. New Haven, 71 Conn. 316, 333, 42 Atl. 87, 43 L. R. A. 490.

7 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400, 403.

student nurses are educated in a hospital and receive board and room and instruction in return for services rendered, does not affect its charitable character.[8] What has just been said is not confined to hospitals and schools. An orphan asylum is exempt, though it accepts children for pay.[9] That a library charges a price for the use of its books when they are taken out, does not subject it to taxation.[10] That a young women's home charges a small sum to a portion of those who eat at its table and enjoy the shelter of its roof, does not destroy its character as a public charity.[11]

§ 719. **Used or Exclusively Used. Incidental Use for other Purposes.** We have seen that the fact that a charity has employees who do their work without any charitable motive, or that it receives compensation in money or work from some of its beneficiaries, does not affect its character. The same is true where some other purely incidental use is made of its facilities. A distinction must be made between the primary and the secondary use of its property, between the dominant purpose and its incidents. If the latter do not interrupt the exclusive occupation of the building for the charitable purposes, but dovetail into them, or round them out, an exclusive use remains.[12] Says the Georgia court: "Property used for raising income is not exempt, although the income may be used for charitable purposes; but property used for charitable purposes is not taxable, although, in the operation of the charity, incidental income may be derived."[13] Many things depend upon who is doing them and the purpose for which they are done. "When a religious organization serves a meal or lap supper in the basement of its church, and charges for it, even for the purposes of raising money to meet a deficiency in connection with its church matters, or to be used in religious work, no authority has ever held that for that reason the church building was

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[8] 1907, Sisters of Third Order v. Peoria County, 231 Ill. 317, 323, 83 N. E. 272.

[9] 1896, Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 36 S. W. 921, 19 Ky. Law Rep. 1091, 40 L. R. A. 119.

[10] 1894, Mercantile Library Co. v. Philadelphia, 161 Pa. 155, 28 Atl. 1068.

[11] 1889, Philadelphia v. Women's Christian Ass'n, 125 Pa. 572, 17 Atl. 475.

[12] 1908, State v. Johnston, 214 Mo. 656, 113 S. W. 1083.

[13] 1903, Linton v. Lucy Cobb Institute, 117 Ga. 678, 684, 45 S. E. 53.

not used solely and exclusively for religious worship."[14] That a lessee pays a small rent for the right to cut and carry away grass from the unoccupied land of a cemetery, does not make the property taxable.[15] A cemetery corporation need not permit its unoccupied land to remain uncared for, thus detracting from beauty of scene and surroundings desired by the average person for the final resting place of loved ones whose memory is still fragrant. It may adopt such a plan to keep its unused land in order as may be advantageous and does not lose the exemption, though a benefit in addition to its improved appearance is derived from the land.[16] Where, therefore, the legislature amends a provision reading "actually and exclusively used" to make it read "actually used," it does not extend the exemption to cases of permanent partial occupancy of buildings for business purposes, but merely makes it clear that an occasional use of it for other purposes will not bar the exemption.[17] However, where the statute prescribes that the property to be exempt is to be "devoted" exclusively to the purposes of the institution, property not used for any purpose is subject to taxation.[18]

§ 720. **Used or Exclusively Used. Examples of Incidental Use.** There is high authority to the effect that the use of a school building in the vacation period, as a boarding house, is not a waiver or forfeiture of its exemption.[19] "The policy of the exemption is the encouragement of learning. This policy is not subverted, but on the contrary is promoted by permitting the plaintiff to devote the premises to a profitable use during the summer months, when they are not needed and cannot be used for the purposes of a school."[20] The

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[14] 1918, Horton v. Colorado Springs Masonic Bldg. Soc., 64 Colo. 529, 173 Pac. 61, 63 (Colo.). For an actual example of a fair given in an armory see 1885, Scranton City Guard Ass'n v. Scranton, 2 C. P. Rep. 217, 1 Pa. Co. Ct. Rep. 550.

[15] 1907, People v. Stillwell, 190 N. Y. 284, 291, 292, 83 N. E. 56.

[16] 1921, Hope Cemetery Ass'n v. Rose, 191 N. Y. Supp. 623, 117 Misc. 457.

[17] 1915, Washington Camp v. Board of Equalization, 87 N. J. Law 53, 93 Atl. 856.

[18] 1923, Berger v. University of New Mexico, —— N. M. ——, 217 Pac. 245.

[19] 1909, Anniston City Land Co. v. State, 160 Ala. 253, 260, 48 So. 659.

[20] 1885, Temple Grove Seminary v. Cramer, 98 N. Y. 121, 126. Contra as to an athletic field, see 1905, Adelphi College v. Wells, 89 N. Y. Supp. 957, 97 App. Div. 312 (affirmed 180 N. Y. 534, 72 N. E. 1147).

same is true where the renting is for a very short period, and the use by the lessee does not interfere with the dominant charitable purpose.[21] A small store conducted in a room of a college, whose income is used to support the college athletics,[22] a greenhouse on a cemetery property whose products are used to beautify the cemetery, though a small amount of the surplus is sold,[1] a barn on school grounds temporarily used for the storage of automobiles, and a small plot of ground, used as a garden,[2] are other examples of such incidental use. That real property held by a charity is charged with an annuity, does not make it taxable, particularly where the annuity is paid out of the proceeds of personal estate.[3] It has even been held that the fact that a lodge devotes a part of its building to a billiard and card room, and a room where liquor and refreshments are served, and gives an occasional dance, thus promoting good fellowship and making it possible to pursue its charitable aims, is incidental and does not make the building taxable.[4]

§ 721. **Used or Exclusively Used. Examples of Dominant Non-Charitable Use.** Some of the above cases come very close to the line. Actual cases which go beyond it can very easily be supplied. An old inn converted into a school building, but used the year around in part as a public hotel, is not exempt as being used exclusively for school purposes.[5] An office building used by a state grand lodge is not used by it with sufficient directness, immediateness, and exclusiveness to be exempt.[6] Three houses, used as an ordinary boarding

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[21] 1904, Curtis v. Androscoggin Lodge, 99 Me. 356, 358, 59 Atl. 518; 1897, Carter v. Patterson, 39 S. W. 1110 (Tex.); 1916, Hardin v. Rock Springs Lodge, 23 Wyo. 522, 154 Pac. 323.

[22] 1912, Mercersburg College v. Mercersburg Borough, 53 Pa. Super. Ct. 388, 400.

[1] 1904, State v. Lakewood Cemetery Ass'n, 93 Minn. 191, 101 N. W. 161.

[2] 1920, Webb Academy v. Grand Rapids, 209 Mich. 523, 177 N. W. 290.

[3] 1903, Morris v. Westminster College, 175 Mo. 52, 74 S. W. 990; 1917, Grand Lodge v. Moultrie County, 281 Ill. 480, 117 N. E. 1016.

[4] 1911, Salt Lake Lodge v. Groesbeck, 120 Pac. 192, Ann. Cas. 1914 B 940 (Utah). See 1916, Hardin v. Rock Springs Lodge, 23 Wyo. 522, 154 Pac. 325.

[5] 1913, Anniston City Land Co. v. State, 185 Ala. 482, 64 So. 110. See for a similar case 1878, Phillips Exeter Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589. But see 1886, Willard v. Pike, 59 Vt. 202, 9 Atl. 907. Followed 1912, Scott v. St. Johnsbury Academy, 86 Vt. 172, 84 Atl. 567.

[6] 1910, Mason v. Zimmerman, 81 Kans. 794, 106 Pac. 1005.

school, are not exempt as buildings "erected for the use of a college, incorporated academy or other seminary of learning." Boarding schools are more for the rich than for the poor, and are ordinarily commercial rather than charitable institutions. The children of the rich frequently spend a large part of their childhood there.[7] A college pumping station,[8] or power plant,[9] used to supply a near-by village with light or water, are other examples. In the case of a theosophic society, the paramount object, the dissemination of theosophic ideas, controls. That some literary work is done does not change the situation.[10]

§ 722. **Used or Exclusively Used. Time as an Element.** Occasionally, a charitable organization uses its property only a few days in the year. This fact, by itself, will not deprive it of its exemption, as the character, not the amount of the use, is the decisive element.[11] Under such circumstances, however, the inducement to rent such property for commercial purposes is very great indeed. The result cannot be in doubt. A park or structure used for the direct purposes of the organization only a few days in the year, and subject to rent at all other times, becomes primarily a commercial venture, and its use for charitable purposes becomes incidental. Accordingly, a chautauqua property,[12] the hall of a lyceum,[13] a theater building,[14] and a park owned by a Knight Templar organization,[15] have been held to be subject to taxation, because they were dominantly used for such commercial purposes as a summer resort or a moving picture show, and only incidentally for the purposes of the charity.

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[7] 1850, Chegary v. Jenkins, 5 N. Y. Super. Ct. (3 Sandf.) 409 (affirmed 5 N. Y. (1 Seldon) 376).

[8] 1909, Kenyon College v. Schnebly, 31 Ohio Cir. Ct. Rep. 150, 154.

[9] 1919, Commonwealth v. Smallwood Memorial Institute, 124 Va. 142, 97 S. E. 805 (Va.); 1912, Commonwealth v. Berea College, 149 Ky. 95, 100, 147 S. W. 929; 1893, Northhampton County v. Lehigh University, 13 Pa. Co. Ct. Rep. 659.

[10] 1898, New England Theosophical Corporation v. Boston, 172 Mass. 60, 51 N. E. 456, 42 L. R. A. 281.

[11] 1895, Pennsylvania Hospital v. Delaware County, 169 Pa. 305, 32 Atl. 456.

[12] 1901, Bosworth v. Kentucky Chautauqua Assembly, 112 Ky. 115, 65 S. W. 602, 23 Ky. Law Rep. 1393.

[13] 1891, Salem Lyceum v. Salem, 154 Mass. 15, 27 N. E. 672.

[14] 1918, Elks Theatre Co. v. New Iberia, 143 La. 162, 78 So. 433.

[15] 1900, Lacy v. Davis, 112 Iowa 106, 83 N. W. 784.

§ 723. **Used or Exclusively Used. Devotion of the Profits to the Charity.** We have seen that property used directly for the purposes and in the operation of a charity is exempt, though it is also used in a manner to yield some return. It will be well to pursue the inquiry one step further. The principle involved may be stated as follows: Property which is not used directly for the purposes and in the operation of the charity, but for profit, is not exempt, and the devotion of the profits to its support will not alter this result.[16] Certainly, where an entire building is let to tenants, it cannot be said that it is used for charitable purposes. "The direct and immediate use of the property itself is meant, and not the remote and consequential benefit derived from its use."[17] It would be a rather forced construction to say that a building with eight stores on the ground floor, with a merchants' exchange and other rooms used for miscellaneous purposes, is used exclusively for charitable purposes.[18] The ownership of a cotton press bequeathed to it, and the application of the revenues to its charitable purposes, does not constitute the "actual use" contemplated by the written law.[19] In Louisiana, therefore, when the constitutional convention discussed the article exempting property used exclusively for charitable purposes, an amendment offered to include "the property thereof, so far as may be actually necessary for the use or support thereof" was defeated.[20]

§ 724. **Used or Exclusively Used. Publishing House or Book Store.** What is a principal and what an incident is not always easy to determine. A denominational book store or publishing house is frequently a most important, if not in-

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[16] 1895, Pennsylvania Hospital v. Delaware County, 169 Pa. 305, 32 Atl. 456. For cases which illustrate the principle, see 1893, Brodie v. Fitzgerald, 57 Ark. 445, 22 S. W. 29; 1896, School District of Ft. Smith v. Howe, 62 Ark. 481, 37 S. W. 717; 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522; 1895, Stahl v. Kansas Educational Ass'n, 54 Kans. 542, 38 Pac. 796; 1910, Summonduwot Lodge v. Spaeth, 81 Kans. 894, 106 Pac. 1077; 1918, Odd Fellows Building Ass'n v. Naylor, 53 Utah 111, 177 Pac. 214.

[17] 1911, Grand Lodge v. Burlington, 84 Vt. 202, 208, 78 Atl. 973.

[18] 1850, Cincinnati College v. State, 19 Ohio 110, 113.

[19] 1879, New Orleans v. St. Anna's Asylum, 31 La. Ann. 292 (Reversed 105 U. S. 362, 26 L. Ed. 1128).

[20] 1883, State v. Board of Assessors, 35 La. Ann. 668, 670.

dispensable adjunct to its church work. This fact has led the Tennessee court to hold that a Methodist Episcopal publishing concern, whose income is exclusively used for the purposes of the church, is exempt as a purely public charity and as property used exclusively for charitable purposes.[1] This decision was rendered by a divided court and is certainly open to criticism. The same court, therefore, has declared that "it certainly will not be extended."[2] Accordingly, the Texas civil court[3] and the Indiana appellate court[4] have held that the property of such a publishing concern is taxable. The Pennsylvania court has decided that carrying on a book store for profit subjects such business to taxation, even though the entire profit goes to the principal institution for the purposes of its charitable intentions.[5] Where, however, the predominant object of a Sunday school publishing society is to spread the gospel and to elevate humanity by the means of its books and Sunday school lesson helps, and no other than such books and helps are handled, it is exempt, though a part of this material is sold for its full or for a part of its value. It is not the profits thus realized, but the distribution of the literature that directly accomplishes the charitable purposes.[6] A similar conclusion has been reached by the Wisconsin court.[7]

§ 725. **School Property Exemption. Construction.** In determining the exemptions accorded to institutions of learning, it will not do to give too narrow a construction to the statutes. "If the use of property utilized for a school is limited to that which is indispensable for this purpose, the extent to which institutions of this character are benefited by exemption from taxation is confined to the narrowest possible limits, and every use which could be dispensed with,

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1 1892, M. E. Church South v. Hinton, 92 Tenn. 188, 21 S. W. 321.

2 1913, Ward Seminary v. Nashville, 129 Tenn. 412, 421, 167 S. W. 113.

3 1901, Barbee v. Dallas, 26 Tex. Civ. App. 571, 64 S. W. 1018.

4 1919, United Brethern Publishing Establishment v. Shaffer, 74 Ind. App. 178, 123 N. E. 697. See 1921, Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852.

5 1894, American Sunday School Union v. Taylor, 161 Pa. 307, 29 Atl. 26, 23 L. R. A. 695.

6 1919, Congregational Sunday School and Publishing Society v. Board of Review, 290 Ill. 108, 125 N. E. 7.

7 1922, Northwestern Publishing House v. Milwaukee, 177 Wis. 401, 188 N. W. 636.

and yet permit a school to be conducted, which might be so termed in name, would subject the property so used to taxation. Such a construction would be too narrow, and fall far short of expressing the intent of the people and legislature."[8] In deciding whether property is used for school purposes, a good deal of importance will be attached to the decision of the school authorities. Says the Massachusetts court: "The dominant purpose of the managing officers of the corporation, in the use of the property which they direct or permit, is often, although not always, controlling. So long as they act in good faith and not unreasonably in determining how to occupy and use the real estate of the corporation, their determination cannot be interfered with by the courts."[9] Of course, where "all corporate property" of a university is exempted, the fact that such property extends beyond necessary grounds is immaterial.[10]

§ 726. **Teachers' Residence in School Building the Dominant Feature.** Not infrequently, one or more of the teachers of a school reside in one of the school buildings. The character of such residence determines the question of exemption. Where such residence is the dominant feature, no exemption is allowed. "Premises, the main purpose of which, or the principal use to which put, is to afford a place of residence, a habitation, to the owner, his family and others whom he may admit to his household, do not become irresponsible for taxes by reason of the fact that a school is carried on there."[11] A building, partly occupied as a dormitory, partly as a professor's residence may, therefore, not be exempt as a seminary of learning.[12] Where the instructor lives in the building as a matter of mere personal convenience and advantage, it will not be exempt as property used exclusively for school purposes.[13] The house of a practicing attorney is not exempt because his wife conducts a school therein. "It was never contemplated that a man engaged in any calling, other than

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[8] 1901, Cathedral of St. John v. Arapahoe County, 29 Colo. 143, 146, 68 Pac. 272.

[9] 1904, Emerson v. Milton Academy, 185 Mass. 414, 415, 70 N. E. 442.

[10] 1891, Nobles County v. Hamline University, 46 Minn. 316, 48 N. W. 1119.

[11] 1900, Ferrell v. Penrose, 52 La. Ann. 1481, 1482, 27 So. 945.

[12] 1899, New London v. Colby Academy, 69 N. H. 443, 46 Atl. 743.

[13] 1901, Watson v. Cowles, 61 Neb. 216, 85 N. W. 35.

teaching, could, by having his wife teach school in the residence, exempt it from taxation.''[14]

§ 727. **Teachers' Residence in a School Building as an Incident.** A different situation exists where the school purposes are the dominant feature. This distinction is forcibly brought out in two Texas cases which involved the same property. In the first the building was used principally as a residence and hence was held to be taxable.[15] Nine years later the school purposes had become predominant and, hence, the same court now held that it was exempt.[16] It follows that the partial use of the college buildings by its teachers as a means of achieving its objects is not fatal to the exemption.[17] The occupancy of a small portion of a school building by its principal and manager is no diversion of it from its proper uses where it is essential to its proper management.[18] That the nuns, who conduct a school have their home in the building as a family, does not deprive it of its exemption.[19] The same is true where the owner and his wife, who are both teachers, reside therein,[20] and the building is used as a military school, and the residence is shared by the owner's entire family, who participate in its management. ''To hold that the proprietor of such school, charged with the primary duty of ideally developing the mind, manners and morals of his pupils, may reside in the schoolhouse if he is unmarried and thus have the benefit of the exemption, and may lose it if he is married and reside there, or to hold that if married his wife and children must be banished though his family be in a manner merged in the school family, is to make the law absurd and harsh.''[21] Even the fact that the instructor, who occupies with his family a

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[14] 1896, Edmonds v. San Antonio, 14 Tex. Civ. App. 155, 157, 36 S. W. 495.

[15] 1880, Red v. Johnson, 53 Tex. 284.

[16] 1889, Red v. Morris, 72 Tex. 554, 10 S. W. 681.

[17] 1898, State v. Parish of Orleans, 52 La. Ann. 223, 26 So. 872. It is different where priests, serving a near by church enjoy the same privilege. 1887, Blackman v. Houston, 39 La. Ann. 592, 2 So. 193.

[18] 1885, Nashville v. Ward, 84 Tenn. (16 Lea) 27.

[19] 1883, Casiano v. Ursuline Academy, 64 Tex. 673; 1887, Church of St. Monica v. New York, 55 N. Y. Super. Ct. (23 Jones and S.) 160, 171, 13 N. Y. St. Rep. 308 (Reversed 119 N. Y.91, 23 N. E. 294, 7 L. R. A. 70).

[20] 1897, Carter v. Patterson, 39 S. W. 1110 (Tex.).

[21] 1908, State v. Johnston, 214 Mo. 656, 667, 113 S. W. 1083.

building used as a theological seminary, is a bishop, who devotes a part of his time to his Episcopal duties, does not make the property taxable.[1]

§ 728. **Residence of Teachers in houses owned by the School.** An analogous situation is presented where the teachers reside in separate residences which are owned by the school. The fact that adequate accommodations for teachers cannot otherwise be procured,[2] or that the presence of the professors is desirable or essential in keeping up the proper discipline,[3] are matters to be considered. The distinction, therefore, between exempt and non-exempt property is between an occupancy which is for the private benefit and convenience of the officer, and is so regarded by the parties and establishes the relation of landlord and tenant, and an occupancy where the dominant or principal matter for consideration is the effect in promoting the objects of the institution in the various ways in which such occupancy tends to promote them.[4] "Buildings outside of the college grounds are not relieved from taxation because occupied by a member of the faculty, nor are buildings inside the grounds which are leased to strangers; but the buildings owned by the college, which are located within the enclosure, whether filled with teachers or scholars belonging to and forming part of the true college, the institution of learning, are part of the seat or home of the institution and protected as such."[5] Occupancy by the faculty without rent of houses on the college grounds, under circumstances rendering such occupancy incidental to their relation to the college under contracts for their personal service in educating and supervising its students, gives them no estate in the land, does not create the relation of landlord and tenant, and exempts such property as "necessary for the proper occupancy, use

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[1] 1901, Cathedral of St. John v. Arapahoe County, 29 Colo. 143, 68 Pac. 272.

[2] 1907, Kenyon College v. Schnebly, 31 Ohio Cir. Ct. Rep. 150.

[3] 1900,. Phillips Academy v Andover, 175 Mass. 118, 124, 55 N. E. 841, 48 L. R. A. 550; 1904, Emerson v. Milton Academy, 185 Mass. 414, 416, 70 N. E. 442.

[4] 1900, Phillips Academy v. Andover, 175 Mass. 118, 123, 55 N. E. 841, 48 L. R. A. 550.

[5] 1888, Northhampton County v. Lafayette College, 128 Pa. 132, 145, 18 Atl. 516.

and enjoyment of the college."[6] The mere fact that the instructor has donated the house which she occupies to the school, and receives in return an annuity, does not affect the dominant purpose for which she occupies it.[7] The Massachusetts court has, therefore, held that seven houses of Harvard University, occupied by its president, deans and teachers, respectively, are exempt.[8] The separation of such houses from the campus by a street will be immaterial,[9] though a greater distance may make a difference.[10] The same rule of decision has been applied to a convent building adjoining a parochial school and housing the nuns engaged therein as teachers.[11]

§ 729. **House Must be Owned by the School and Must Not be Leased to the Teacher.** In the last paragraph we have considered an occupation by teachers which is incidental to their employment. This requires that the property be owned by the school and that it be not rented by it. Where, therefore, the house is practically the property of the professor, though the university has advanced the necessary money, it is not exempt.[12] The same is true where the building is actually let by the institution, either to a stranger,[13] or to one of its

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[6] 1892, Ramsey County v. Macalester College, 51 Minn. 437, 53 N. W. 704, 18 L. R. A. 278; 1920, Webb Academy v. Grand Rapids, 209 Mich. 523, 177 N. W. 290.

[7] 1919, Thayer Academy v. Braintree, 232 Mass. 402, 122 N. E. 410.

[8] 1900, Harvard College v. Cambridge, 175 Mass. 145, 55 N. E. 844, 48 L. R. A. 547. See for cases involving similar facts: 1899, Yale University v. New Haven, 71 Conn. 316, 334, 42 Atl. 87, 43 L. R. A. 490; 1902, Rettew v. St. Patrick's Church, 4 Pennewill 593, 58 Atl. 828 (Del.); 1919, Thayer Academy v. Braintree, 232 Mass. 402, 122 N. E. 410; 1906, Amherst College v. Amherst, 193 Mass. 168, 79 N. E. 248; 1905, People v. Metzger, 90 N. Y. Supp. 488, 98 App. Div. 237 (Affirmed 181 N. Y. 511, 73 N. E. 1130); 1892, Metzger Institute v. Cumberland County, 2 Pa. Dist. Rep 381; 1888, Northhampton County v. Lafayette College, 5 Pa. Co. Ct. Rep. 407 (Affirmed 128 Pa. 132, 18 Atl. 516).

[9] 1877, Griswolt College v. State, 46 Iowa 275, 26 Am. Rep. 138. See also 1854, State v. Ross, 24 N. J. Law (4 Zab.) 497, 501; 1892, Dickinson College v. Cumberland County, 12 Pa. Co. Ct. Rep. 582, 2 Pa. Dist. Rep. 378.

[10] 1923, Knox College v. Knox County, 308 Ill. 160, 139 N. E. 56.

[11] 1918, Chatham v. Sisters of Charity, 92 N. J. Law 409, 105 Atl. 204; 1899, White v. Smith, 189 Pa. 222, 42 Atl. 125, 43 L. R. A. 498.

[12] 1899, Yale University v. New Haven, 71 Conn. 316, 338, 42 Atl. 87, 43 L. R. A. 490. See also 1900, San Antonio v. Seeley, 57 S. W. 688 (Tex. Civ. App.).

[13] 1906, Amherst College v. Amherst, 193 Mass. 168, 178, 79 N. E. 248.

professors,[14] or even to its president.[15] The dominant purpose in all these cases is that of residence. Under exceptional circumstances, the same may be true even though the property is owned by the school and is not let by it in the technical sense. Says the Ohio court: "A house merely occupied as a dwelling house, and not as a place where any of the exercises and recitations of the college are had; a house whose size and value may solely depend on the extent of a professor's family, not one of whom may have any connection with the college, cannot be said to be a building 'occupied for literary purposes' within the meaning of the law."[16] The mere fact that rent is charged as a matter of bookkeeping is not, however, decisive. Where an old wooden building is occupied by a workman of the charity by reason of services, it is not taxable, though rent is received therefor as a convenient mode of adjusting his compensation,[17] even though such rent is collected by a deduction from his salary. The same is true where a professor's salary is diminished by what is termed "rent on the house" which he occupies and which belongs to the school.

§ 730. **Meaning of the Word College.** The word "college" has had a remarkable history.[19] It certainly includes more than the mere recitation halls. "The statute should be applied so as to exempt the entire articulated system of an institution, and not merely the rooms or parts of buildings where tasks are conned or lessons are recited. The criterion is whether the property is exclusively devoted to the use of the academy in the education which the institution offers to those attendant upon it, in the sense that education contemplates their mental, moral, and physical training, and their proper maintenance while upon the rolls."[20] Such

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[14] 1849, Pierce v. Cambridge, 56 Mass. (2 Cush.) 611.

[15] 1899, Amherst College v. Amherst, **supra.**

[16] 1837, Kendrick v. Farquhar, 8 Ohio (8 Ham.) 189, 197.

[17] 1869, Massachusetts General Hospital v. Somerville, 101 Mass. 319. Compare 1897, Williams College v. Williamstown, 167 Mass. 505, 46 N. E. 394.

[18] 1899, Yale University v. New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

[19] 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400.

[20] 1905, People v. Metzger, 90 N. Y. Supp. 488, 489, 490, 98 App. Div. 237 (affirmed 181 N. Y. 511, 73 N. E. 1130).

exemptions include laboratories and classrooms,[21] dining rooms, kitchens, college offices, quarters for the employees, dormitories, study rooms and observatories.[22] In a military boarding school, sleeping and drill rooms, armories and stables, libraries and instructor's residences, recreation and dining halls are exempt as used exclusively for the purposes of the school.[23] Where a school has acquired an old farm with its buildings, all such buildings are exempt though they include a granary, chicken house, greenhouse, and a former garage used as a laundry and gymnasium.[24] Where the institution is situated in the country, a tailor shop, shoe shop, laundry, woodhouse, bake shop, carpenter shop, machine shop, printing office, gas house and boiler room connected with it have been exempted.[1] A school, which conducts a laundry to teach cleanliness to its pupils, a waterworks plant to supply it with water, a printing department leased at times, a small coöperative store, and a tavern for its visitors, students and teachers, has also been exempted. "In the adjuncts above described, so intimately connected with the life of the institution, it has not gone out into an active commercial life nor has it manifested any spirit or purpose to do so."[2] Of course, a fraternity house open only to the members of the fraternity, unlike a clubhouse,[3] open to all students of the school, is not sufficiently immediately connected with the school to be exempt as a dormitory.[4]

§ 731. **Opportunities for Recreation.** Recreation is an essential part of every educational system. Education without enduring health is acquired at too great a sacrifice to make it of much value to either its recipients or to the public at large.[5] Suitable recreation and physical exercise is an

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[21] 1906, Stevens Institute v. Hoboken, 74 N. J. Law 80, 70 Atl. 730; 1886, Willard v. Pike, 59 Vt. 202, 217, 9 Atl. 907.

[22] 1897, Haverford College v. Rhoads, 6 Pa. Super. Ct. 71.

[23] 1905, People v. Metzger, 90 N. Y. Supp. 488, 98, App. Div. 237 (affirmed 181 N. Y. 511, 73 N. E. 1130).

[24] 1919, Mary Immaculate School v. Ossining, 175 N. Y. Supp. 701, 188 App. Div. 5.

[1] 1886, People v. Barber, 42 Hun. 27, 3 N. Y. St. Rep. 367. (Affirmed 106 N. Y. 669.)

[2] 1912, Commonwealth v. Berea College, 149 Ky. 95, 100, 147 S. W. 929.

[3] 1907, Chicago v. University of Chicago, 228 Ill. 605, 81 N. E. 1138, 10 Ann. Cas. 669.

[4] 1923, Knox College v. Knox County, 308 Ill. 160, 139 N. E. 56.

[5] 1875, People v. New York, 6 Hun. 109 (N. Y.).

absolute requisite to health and successful mental culture. The means and opportunity for it may, therefore, properly be provided upon the premises of a literary institution for its students,[6] and will be exempt from taxation. Athletic fields[7] and the approaches to the same, and a grove used as a place of recreation,[8] recreation grounds,[9] recreation rooms,[10] gymnasiums and lawns,[11] playgrounds and campus,[12] property beautified by trees and shrubs,[13] are of this type. Land of a school wholly devoted to its use by supporting its buildings, supplying its daily wants, or contributing the means of exercise, recreation and diversion is exempt under the terms "lots whereon such buildings are situated."[14] The same has been held of a thirty-three acre tract of land used partly as a baseball field, partly as a football field, and in large part to give the students an opportunity to roam at large, play games and skate in the winter.[15] A 110-acre tract surrounding an insane asylum, acquired to prevent a too close proximity of buildings harmful to the patients, has been exempted as occupied for the purposes of the institution.[16]

§ 732. **Farm Lands of Agricultural Schools.** A farm is clearly a necessary part of an agricultural school. "To an institution of learning attempting to furnish practical educa-

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[6] 1886, People v. Barber, 42 Hun. 27, 31, 3 N. Y. St. Rep. 367. (Affirmed 106 N. Y. 669.)

[7] 1892, Dickinson College v. Cumberland County, 12 Pa. Co. Ct. Rep. 582, 2 Pa. Dist. Rep. 378; 1897, Haverford College v. Rhoads, 6 Pa. Super. Ct. 71. But see 1909, Stevens Institute v. Bower, 78 N. J. Law 205, 73 Atl. 38.

[8] 1906, Amherst College v. Amherst, 193 Mass. 168, 79 N. E. 248.

[9] 1912, Stoughton v. Hartford, 85 Conn. 674, 84 Atl. 95; 1897, Haverford College v. Rhoads, 6 Pa. Super. Ct. 71; 1883, Cassiano v. Ursuline Academy, 64 Tex. 673.

[10] 1906, Stevens Institute v. Hoboken, 74 N. J. Law 80, 70 Atl. 730; 1905, People v. Metzger, 90 N. Y. Supp. 488, 98 App. Div. 237 (affirmed 181 N. Y. 511, 73 N. E. 1130).

[11] 1897, Haverford College v. Rhoads, supra. See also 1919, Mary Immaculate School v. Ossining, 175 N. Y. Supp. 701, 188 App. Div. 5.

[12] 1913, St. Bridget Convent v. Milford, 87 Conn. 474, 88 Atl. 881; 1920, Webb Academy v. Grand Rapids, 209 Mich. 523, 177 N. W. 290.

[13] 1897, Academy of Sacred Heart v. Irey, 51 Neb. 755, 71 N. W. 752.

[14] 1875, People v. New York, 6 Hun. 109 (N. Y.).

[15] 1904, Emerson v. Milton Academy, 185 Mass. 414, 70 N. E. 442.

[16] 1869, Massachusetts General Hospital v. Somerville, 101 Mass. 319, 321.

tion in agriculture, and to give boys physical development by manual labor, a farm is as necessary as are chemicals and chemical apparatus to a teacher of chemistry."[17] It follows that such a farm is exempt, though a part of its products, not needed for its pupils, is sold or exchanged.[18] Accordingly, a model dairy farm conducted by the Hampton Institute has been exempted, though the sale of its products produced a profit of $9,000 a year.[19] To bring about this result, however, such profits must be applied to the general purposes of the school.[20]

§ 733. **Farm Lands of Non-Agricultural Schools. Exemption.** It is not necessary, however, that the institution be an agricultural school using the farm as a laboratory. There is no healthier exercise for students than work on a farm. It not only affords recreation and relieves the ennui that results from severe mental application, but also enables poor students to earn their way through college. Besides, it furnishes supplies for the college tables. Gardens and farms owned by schools and other similar charities have, therefore, universally been exempted,[21] even though they are operated by hired help,[1] and though a part of the produce is sold instead of consumed.[2] Says the Massachusetts court: "If certain valuable chemicals are produced in a school by prac-

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17 1887, Mount Hermon Boys' School v. Gill, 145 Mass. 139, 147, 148, 13 N. E. 354.

18 1887, Mount Hermon Boys' School v. Gill, **supra.**

19 1907, Commonwealth v. Hampton Institute, 106 Va. 614, 56 S. E. 594. See also 1919, Commonwealth v. Smallwood Memorial Institute, 124 Va. 142, 97 S. E. 805 (Va.).

20 1922, In re Central Union Conference Ass'n, —— Neb. ——, 189 N. W. 982.

21 1912, Stoughton v. Hartford, 85 Conn. 674, 84 Atl. 95; 1902, Rettew v. St. Patrick's Church, 4 Pennewill 593, 58 Atl. 828 (Del.); 1883, Monticello Female Seminary v. People, 106 Ill. 398, 46 Am. Rep. 702; 1868, Wesleyan Academy v. Wilbraham, 99 Mass. 599; 1919, Mary Immaculate School v. Ossining, 175 N. Y. Supp. 701, 188 App. Div. 5; 1889, State v. Fisk University, 87 Tenn. (3 Pickle) 233, 10 S. W. 284; 1883, Cassiano v. Ursuline Academy, 64 Tex. 673.

1 1886, People v. Barber, 42 Hun. 27, 3 N. Y. St. Rep. 367.

2 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400; 1897, Academy Sacred Heart v. Irey, 51 Neb. 755, 71 N. W. 752; 1896, Newark v. Verona Twp., 59 N. J. Law 94, 34 Atl. 1060; 1901, People v. Barton, 71 N. Y. Supp. 933, 63 App. Div. 581; 1890, People v. Purdy, 58 Hun. 386, 12 N. Y. Supp. 307 (Affirmed 126 N. Y. 679, 28 N. E. 249. See 1890, State v. Chatham, 52 N. J. Law (23 Vroom) 373, 20 Atl. 292, 9 L. R. A. 198 (reversing 51 N. J. Law (22 Vroom) 89, 16 Atl. 225).

tical instruction in chemistry, and are subsequently sold instead of being wasted, that does not change the character of the use of the apparatus and of the original ingredients employed. And if a farm is set apart and cultivated to supply food for a family or community, it does not cease to be used for that purpose because, in the economical management of it, there are certain products which cannot be utilized otherwise than by sale."[3]

§ 734. **Farm Land by Non-Agricultural School. Taxation.** Not all the courts have taken this liberal view. Some of them have pointed out that such land, though convenient and perhaps profitable, is in no sense a necessary or usual adjunct of an educational institution,[4] but is a business enterprise not exempt from taxation, though its products are directly consumed by the beneficiaries.[5] This is particularly so where the farm is used to raise produce for sale, or stock not necessary to be kept on it. Says the Kansas court: "Such use goes at least one step beyond where concessions can be made in favor of its exemption."[6] Accordingly, a farm owned in another county by a convent,[7] or owned by a hospital,[8] has been denied exemption though the income was devoted to charitable purposes. The Connecticut court has held that the word "building," though it covers the land on which it stands, does not cover a vegetable garden, though its products are consumed by the pupils and teachers.[9]

§ 735. **Summer Homes, Clubs, Camp Meetings.** Summer homes are generally luxuries in which only the rich and well-to-do can indulge. Yet they may doubtlessly be essential parts of a property devoted to charity. Excursions into the country on the part of children from the slums of our large cities, financed by humanitarians, are doubtlessly charitable enterprises. It is the character of the use, not its amount,

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[3] 1887, Mount Hermon Boys' School v. Gill, 145 Mass. 139, 149, 13 N. E. 354.

[4] 1912, Mercersburg College v. Mercersburg Borough, 53 Pa. Super. Ct. 388, 400; 1891, St. Edwards College v. Morris, 82 Tex. 1, 17 S. W. 512.

[5] 1909, In re Sisters of the Blessed Sacrament, 38 Pa. Super. Ct. 640.

[6] 1872, St. Mary's College v. Crowl, 10 Kans. 442, 449.

[7] 1878, Delaware County v. Sisters of St. Francis, 2 Del. County Rep. 149 (Pa.).

[8] 1905, State v. St. Barnabas Hospital, 95 Minn. 489, 104 N. W. 551.

[9] 1913, St. Bridget Convent v. Milford, 87 Conn. 474, 88 Atl. 881,

that determines the title to exemption. It has, therefore, been held that land used by an orphan asylum as a summer resort for its beneficiaries is exempt to the extent to which it is necessary for such purposes.[10] A farm used by a hospital as an open air sanitarium, and roaming ground for manageable and convalescent patients, is exempt, though it is used only in the summer and autumn.[11] The same is true of a mansion used by the students of a religious order as a summer home.[12] A summer home for children and old persons is not taxable as not "actually used" for charitable purposes, because it was vacant on October 1, the assessment day. "The test of exemption cannot be made to turn upon the fact of an accidental closing of the home depending upon the weather sometimes earlier, sometimes later, in the season."[13] Camp meeting grounds are in the same class where the income derived is strictly incidental and no element of private gain is present.[14] A Catholic woman's club, operating a fine property in a down-town district, has been held to be exempt under the Wisconsin statutes.[15] However, a mere health resort conducted for profit is not exempt.[16] The same is true of an open air educational institution situated in a summer resort region, which accommodates, in addition to those seeking instruction, those seeking rest and recreation, and charges for the latter service the rates usual in the vicinity.[17] A boarding house and summer villa conducted by a religious order, the profits being used for charitable purposes, cannot escape taxation. "The fact that the profits of a commercial enterprise are either in whole or in part devoted to charity, certainly does not operate to render the business itself a charity, nor is the property in which

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[10] 1911, Mountainside v. Board of Equalization, 81 N. J. Law 583, 80 Atl. 488 (affirming 80 N. J. Law 38, 76 Atl. 324).

[11] 1895, Pennsylvania Hospital v. Delaware County, 169 Pa. 305, 32 Atl. 456.

[12] 1901, Mission of St. Vincent De Paul v. Brakely, 67 N. J. Law 176, 50 Atl. 589.

[13] 1922, Seaside Home v. State Board of Taxes, —— N. J. ——, 118 Atl. 704.

[14] 1912, Johnson v. Johnson, 86 Vt. 167, 171, 83 Atl. 1085.

[15] 1923, Catholic Woman's Club v. Green Bay, —— Wis. ——, 192 N. W. 479.

[16] 1916, Huntington v. Swedish Baptist Home, 90 Conn. 504, 97 Atl. 860.

[17] 1905, Pocono Pines Assembly v. Monroe County, 29 Pa. Co. Ct. 36.

it is carried on, by reason of such appropriation of profits, used for charitable purposes."[18]

§ 736. **Property of a Charity Widely Separated.** The question of use and occupancy is presented in a very striking form where property of a charity, separated by miles of distance, or by a street, railroad, river, or other natural or artificial barrier, is in question. The inquiry, whether or not such barriers prevent exemption, depends so much on the nature and purposes of the institution that a categorical answer becomes impossible. Any such physical separation, while sometimes important and even decisive, is not necessarily so. Two plots of ground may be miles apart in different counties and yet be exempt.[19] While eighty acres of land, two miles from a college, of no present use for educational purposes, and held as an investment, are not exempt,[20] a one hundred acre tract of land in the country, owned by a city and used to give work to the inmates of its home for delinquent boys, is exempt from taxation, as the whole tract is necessary to the successful operation and maintenance of the institution.[21] The same is true where an orphan asylum has a summer home for its beneficiaries in the country away from the heat and dust and turmoil of the city.[22] Real estate of Harvard College outside of Cambridge has also been held to be exempt under a very liberal statute.[23] Certainly the fact that city blocks intervene between the main buildings of a college and some of its other buildings and grounds is of no importance in applying the exemption rule.[24] Of

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[18] 1900, Sisters of Peace v. Westervelt, 64 N. J. Law 510, 512, 45 Atl. 788 (affirmed 65 N. J. Law 685, 48 Atl. 789).

[19] 1895, Pennsylvania Hospital v. Delaware County, 169 Pa. 305, 308, 32 Atl. 456; 1909, Webster City v. Wright County, 144 Iowa 502, 123 N. W. 193, 24 L. R. A. (N. S.) 1205. But see 1878, Delaware County v. Sisters of St. Francis, 2 Del. Co. Rep. 149 (Pa.); 1819, Stewart v. Davis, 7 N. C. 244.

[20] 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400, 404.

[21] 1896, Newark v. Verona Twp., 59 N. J. Law 94, 34 Atl. 1060.

[22] 1911, Mountainside v. Board of Equalization, 81 N. J. Law 583, 80 Atl. 488 (affirming 80 N. J. Law 38, 76 Atl. 324).

[23] 1819, Harvard College v. Kettell, 16 Mass. 204.

[24] 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400, 402.

course, where such outside property is not used by the institution, but is let for profit, it is taxable.[25]

§ 737. **Intersection by Street or Highway. Exemption.** The fact that the property of charitable institutions is intersected by a street or road does not of itself make such property partly taxable. "The accident that a public highway has been constructed over the grounds does not destroy or affect their identity as 'the lot' within the meaning of the exemption statute, on which the buildings are situated. The connection and unity of the whole parcel for the uses of the college remain, notwithstanding the public easement. The intersections of public highways are not in themselves such a severance as of legal necessity divides the grounds of the college into exempt and non-exempt parcels."[1] Therefore, the fact that the property of a school is intersected by a highway and a railroad does not affect the question of exemption.[2] It follows that, where an empty lot is cut off from the grounds of a charity by a street, it will not be subject to taxation until it is diverted to some other object.[3] The same is true of a professor's dwelling separated from the campus by a street,[4] or by a greater distance than that indicated by a street,[5] though it is also surrounded by a substantial fence.[6]

§ 738. **Intersection by Street, River, Railroad Track, etc. Taxation.** The existence of any such natural or artificial obstruction, however, may mark the property on one side of it as not being used for charitable purposes. In such cases it will be of the utmost importance. A street,[7] a road,[8] a

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[25] 1819, Stewart v. Davis, 7 N. C. 244; 1887, Wagner Free Institute's Appeal, 116 Pa. 555, 11 Atl. 402.

[1] 1877, John's College v. New York, 10 Hun. 246, 247, 248 (N. Y.).

[2] 1886, People v. Barber, 42 Hun. 27, 33, 3 N. Y. St. Rep. 367 (affirmed 106 N. Y. 669).

[3] 1892, Methodist Home v. Philadelphia, 3 Pa. Dist. Rep. 141. But see 1893, Philadelphia v. Ladies United Aid Soc., 154 Pa. 12, 25 Atl. 1042 (affirming 12 Pa. Co. Ct. Rep. 346).

[4] 1877, Griswold College v. State, 46 Iowa 275, 26 Am. Rep. 138.

[5] 1923, State v. Carleton College, —— Minn. ——, 191 N. W. 400.

[6] 1854, State v. Ross, 24 N. J. Law (4 Zab.) 497, 501.

[7] 1881, Presbyterian Theological Seminary v. People, 101 Ill. 578; 1893, Philadelphia v. Ladies United Aid Soc., 154 Pa. 12, 25 Atl. 1042 (affirming 12 Pa. Co. Ct. Rep. 346).

[8] 1877, People v. Graceland Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; 1903, People v. Reilly, 83 N. Y. Supp. 39, 85 App. Div. 71

railroad track,[9] a river of considerable size without bridge connection,[10] and the unaccessible palisades of the Hudson,[11] have been treated by the courts as marking the extent to which the property was used for charitable purposes. Nor will it be necessary that the dividing line be as definite as a road or street. It might be a fence or even a furrow drawn across the ground and marking the line where the charitable use terminates.[12] A separate adjoining lot purchased, held, and used by a cemetery for an office and dwelling house of its custodian, and to supply water to it, is taxable, though it directly adjoins the cemetery and was purchased originally to provide an entrance to it from the street.[13]

§ 739. **Wild and Unimproved Land.** While the New Jersey court has held that unimproved land of a charitable institution is exempt,[14] the weight of authority leans in the opposite direction. The Minnesota court has decided that the south twenty acres of a forty acre tract of land, the north half of which is used as a campus, is not exempt where it is swampy and is not used for any purpose.[15] In New York, a former hotel property used as a school and consisting of two tracts of land separated by a road, one of which was used only for the purpose of taking wood from it, has been exempted only as to the other tract on which the school buildings were situated.[16] In another New York case, an Indian school situated on a 467 acre tract of land has been taxed with the exception of 130 acres which were in use.[17] A 230 acre tract of land, containing a summer home for students of a religious order, and consisting mostly of woodland, has been held not to be **ipso facto** exempt in its

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(affirmed 178 N. Y. 609, 70 N. E. 1107).

[9] 1916, Mt. Pleasant Cemetery Co. v. Newark, 89 N. J. Law 255, 98 Atl. 448.

[10] 1912, Johnson v. Johnson, 86 Vt. 167, 83 Atl. 1085.

[11] 1900, Sisters of Peace v. Westervelt, 64 N. J. Law 510, 45 Atl. 788 (affirmed 65 N. J. Law 685, 48 Atl. 789).

[12] 1885, State v. Lange, 16 Mo. App. 468.

[13] 1897, Bloomington Cemetery Ass'n v. Baldridge, 170 Ill. 377, 48 N. E. 905.

[14] 1899, Cooper Hospital v. Burdsall, 63 N. J. Law 85, 42 Atl. 853.

[15] 1892, Ramsey County v. Macalester College, 51 Minn. 437, 443, 53 N. W. 704, 18 L. R. A. 278.

[16] 1903, People v. Reilly, 83 N. Y. Supp. 39, 85 App. Div. 71 (affirmed 178 N. Y. 609, 70 N. E. 1107).

[17] 1901, People v. Barton, 71 N. Y. Supp. 933, 63 App. Div. 581.

entirety.[18] The mere ownership by an educational institution, and intention to remove to a quarter section of unimproved and unoccupied land, does not exempt it as being used exclusively for educational purposes.[19] Where, however, a school is located on a former farm of 99 acres, of which 18 are cultivated and 15 are in hay, while a forest of about 30 acres nearly surrounds the cleared land, and the balance is swamp land with impenetrable thickets which prevent the reservoir on the property from flooding it, the whole has been held to be exempt.[20]

§ 740. **Vacant Lots.** What is true of wild land in country districts, holds good in regard to vacant lots in cities.[1] Mere ownership of such lots is not the equivalent of the exclusive use which the statute requires.[2] Though, therefore, a part of a lot is occupied by a building so as to be exempt, the vacant part may be subject to taxation where it is situated at a very valuable street intersection and is held for an advance in value.[3] Similarly, where a college plats a tract of land and sells the lots, a vacant lot left unsold is subject to taxation.[4] "It would be most manifestly unjust if property donated to charitable purposes could be allowed to remain unimproved and unproductive, while rapidly increasing in value and susceptible of being at any time sold for a large amount, and thus escape the ordinary duty of helping to pay the expenses of government."[5] Such land is not exempt, even though the statute exempts the fund with which it is purchased and exempts it after a

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[18] 1901, Mission of St. Vincent De Paul v. Brakely, 67 N. J. Law 176, 50 Atl. 589.

[19] 1871, Washburn College v. Shawnee County, 8 Kans. 344; 1923, Knox College v. Knox County, 308 Ill. 160, 139 N. E. 56.

[20] 1919, Mary Immaculate School v. Ossining, 175 N. Y. Supp. 701, 188 App. Div. 5.

[1] See Zollmann's American Civil Church Law, Page 256, on this question as applied to religious societies.

[2] 1883, Monticello Female Seminary v. People, 106 Ill. 398, 46 Am. Rep. 702; 1913, Ward Seminary v. Nashville, 129 Tenn. 412, 420, 167 S. W. 113; 1904, Cooper Hospital v. Camden, 70 N. J. Law 478, 57 Atl. 260.

[3] 1911, Parson's Business College v. Kalamazoo, 166 Mich. 305, 131 N. W. 553, 33 L. R. A. (N. S.) 921.

[4] 1895, Foy v. Coe College, 95 Iowa 689, 64 N. W. 636.

[5] 1887, Pittsburgh v. Home of the Friendless, 3 Pa. Co. Ct. Rep. 390, 392.

building is erected on it and duly occupied.[6] Frauds on the public revenue would result from exempting vacant property because of the intent in the owner's mind ultimately to use it for charitable purposes. A mere ambulatory and purely potestative dedication of a vacant lot acquired by a charity with the vague purpose of erecting at some time a hospital, school, or church on the same, nothing being done to prevent the owner from abandoning his purpose, or selling the land at a profit, or converting it into business or residence property, is not sufficient.[7] Even where ownership, not use, is the criterion, such ownership must not be for speculative purposes.[8] A different situation, of course, exists where such vacant lots are adjacent to the campus of the owner and are enclosed by the same fence.[9]

§ 741. **Land on Which a Building is Being Erected. Burned Building.** Where a building is actually in course of construction on an otherwise vacant piece of ground, such land has been held to be exempt in Massachusetts,[10] New York,[11] and Pennsylvania.[12] In New Jersey, a contrary conclusion has been reached,[13] and has been followed up by decisions that even completed buildings are not exempt, so long as they are not actually occupied.[14] The same court has held that, where a Y. W. C. A. building has been de-

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[6] 1907, Y. W. C. A. v. Spencer, 29 Ohio Cir. Ct. Rep. 249. For illustrations see 1893, Montana Catholic Missions v. Lewis and Clark Counties, 13 Mont. 559, 35 Pac. 2, 22 L. R. A. 684; 1916, Sioux Falls Lodge v. Mundt, 37 S. D. 97, 156 N. W. 799. But compare 1912, In re Miriam Osborn Memorial Home Ass'n, 140 N. Y. Supp. 786.

[7] 1884, Enaut v. McGuire, 36 La. Ann. 804, 51 Am. Rep. 14. See Zollmann's American Civil Church Law, Page 256.

[8] 1886, Willard v. Pike, 59 Vt. 202, 218, 9 Atl. 907.

[9] 1888, Northhampton County v. Lafayette College, 5 Pa. Co. Ct. Rep. 407 (affirmed 128 Pa. 132, 18 Atl. 516).

[10] 1873, New England Hospital v. Boston, 113 Mass. 518; 1886, Massachusetts Society v. Boston, 142 Mass. 24, 6 N. E. 840.

[11] 1900, People v. Feitner, 65 N. Y. Supp. 537, 31 Misc. 565; 1880, Washington Heights M. E. Church v. New York, 20 Hun. 297 (N. Y.).

[12] 1895, Philadelphia v. Keystone Battery, 169 Pa. 526, 32 Atl. 428. But see 1877, Mullen v. Erie County, 85 Pa. 288, 27 Am. Rep. 650; 1877, Erie County v. Bishop, 13 Phila. 509 (Pa.).

[13] 1910, Institute of Holy Angels v. Ft. Lee, 80 N. J. Law 545, 77 Atl. 1035.

[14] 1902, Presbyterian Board of Relief v. Fisher, 68 N. J. Law 143, 52 Atl. 228; 1917, Longport v. Bamberger Seashore Home, 91 N. J. Law 320, 102 Atl. 633 (Affirming 90 N. J. Law 212).

stroyed by fire, the land is not actually used, and hence is subject to taxation. Says the court: "Use is the dominant factor upon which exemptions of this character are based, and to bring the use within the legislative contemplation, it must be based upon a use of the entity, and cannot be applied to a severance of a freehold, by which the building or the land may be severally and independently exempted."[15]

§ 742. **Temporary Buildings.** A certain degree of permanency is required before exemption will be extended. The mere fact that a makeshift is erected to meet a temporary call is not sufficient. "In cases of emergency, temporary hospitals are often constructed from barns, sheds, tents, and private houses. To hold that the establishment of such temporary hospitals would be sufficient to exempt the property from taxation, would be preposterous."[16] A number of tents for sleeping purposes, and a one-story building used by a charity as a laundry, do, therefore, not come within the meaning of "buildings used exclusively for charitable purposes."[17]

§ 743. **Abandoned Buildings.** The words "used" or "occupied" refer to the present and not to the past. The mere fact that property has at one time been used for charitable purposes does not confer exemption. Occupancy means more than simple ownership and possession. It signifies an active appropriation to the immediate uses of the charity. The property must immediately contribute to the promotion of the charity, and must physically forward its beneficent objects. It follows that, where the children of an orphan home have been removed to families, and the home is occupied only by a caretaker, it is not exempt.[18] The same is true of a schoolhouse[19] and hospital building[20] disused as such for four and twenty years respectively.

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[15] 1918, Y. W. C. A. v. Monmouth County, 92 N. J. Law 330, 331, 105 Atl. 726. See 1875, Trinity Church v. Boston, 118 Mass. 164.

[16] 1894, Pennsylvania Hospital v. Delaware County, 15 Pa. Co. Ct. Rep. 548, 550 (reversed 169 Pa. 305, 32 Atl. 456).

[17] 1902, Children's Seashore House v. Atlantic City, 68 N. J. Law 385, 53 Atl. 399, 59 L. R. A. 947 (affirming 65 N. J. Law 488, 48 Atl. 242).

[18] 1917, Babcock v. Leopold Morse Home, 225 Mass. 418, 114 N. E. 712.

[19] 1858, Pace v. Jefferson County, 20 Ill. (10 Peck) 644.

[20] 1892, Philadelphia v. Jewish

§ 744. **Occupancy by Roomers, Lodgers, etc.** Whether the use of buildings by individuals under some sort of contract affects the right of exemption, depends partly on the nature of the owner, partly on the nature of the occupancy and its dominant purpose. A corporation whose object is to provide wholesome and sanitary homes for working people, which erects a pretentious apartment house with over one hundred apartments of two, three or four rooms each, which are leased to tenants at a reasonable rate, is taxable, since the building is occupied by the tenants, not by the corporation.[1] A different situation exists where rooms in a Y. M. C. A. building are let to lodgers, since the dominant purpose is not profit, but the mental, spiritual and physical improvement of these lodgers.[2] The same is true of a corporation organized to provide a home for working girls at moderate cost,[3] or of a college which provides dormitories and dining halls for its students.[4] Even where a university, instead of providing board itself to its students, merely furnishes a place for the use of its students who club together to obtain for themselves food at cost, the property is occupied for the use of the school and as such is exempt from taxation.[5]

§ 745. **Use of the Property of an Individual Without Compensation.** Where a private owner allows his land to be used for charitable purposes, and charges no rent and derives no personal benefit, such property has been held to be exempt as exclusively used for charitable purposes.[6] Where, however, the statute exempts property "used and set apart" for educational purposes, the situation is different.[7]

Hospital Ass'n, 148 Pa. 454, 23 Atl. 1135.

[1] 1914, Charlesbank Homes v. Boston, 218 Mass. 14, 105 N. E. 459. See 1884, Lynn Workingmen's Ass'n v. Lynn, 136 Mass. 283.

[2] 1914, Commonwealth v. Lynchburg Y. M. C. A., 115 Va. 745, 80 S. E. 589, 50 L. R. A. (N. S.) 1197.

[3] 1905, Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675.

[4] 1899, Yale University v. New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

[5] 1900, Harvard College, v. Cambridge, 175 Mass. 145, 55 N. E. 844, 48 L. R. A. 547.

[6] 1904, Louisville v. Werne, 25 Ky. Law Rep. 2196, 80 S. W. 224. See 1916, Reynolds Memorial Hospital v. Marshall County, 78 W. Va. 685, 90 S. E. 238.

[7] 1898, Travelers' Insurance Co. v. Kent, 151 Ind. 349, 50 N. E. 562, 51 N. E. 723. See also 1900, Bates v. Sharon, 175 Mass. 293, 56 N. E. 586.

§ 746. **Use of Private Property Leased to a Charitable Institution.** Land rented by a charity, though exclusively used by it, is used for private gain and profit so far as the owner is concerned, and hence is subject to taxation. The owner "contributes nothing to the public or to charity; he loses nothing by the use; he is not a benefactor to anyone but he stands before the law in exactly the same light as anyone else who leases his land for any other purpose and uses the rents for his own advantage."[8] As well might the property of one who sells provisions to a charity be exempted. It follows that a dwelling house merely leased by a college for a term of years and used for school purposes is not exempt.[9] "The mere use for school or educational purposes of the property of a private owner, sustaining merely the relation of lessor to a school or seminary, does not create an exemption in his favor."[10]

§ 747. **Property Held by a Charity Under a Long-Term Lease.** That property held under a ninety-nine year lease by a charity is exempt, has been held in Pennsylvania[11] and denied in Illinois.[12] The ownership of the building on the property will be of great importance in such a case. Exemption has been denied where the charity was not such owner,[13] but granted where it was. Said the court in the latter case: "In every practical sense, what is assessed and sought to be taxed is the interest owned and possessed by the plaintiff, and not the reversion of the owner in fee."[14] In a converse case, it has been held that where a charity grants a fifty-year lease and the lessee builds a building on the land, such building is not exempt as the property of the charity where the charity is obligated to buy it at the

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[8] 1905, State v. Maggurn, 187 Mo. 238, 243, 86 S. W. 138. See also 1876, Armand v. Dumas, 28 La. Ann. 403.

[9] 1898, Kittanning Academy v. Kittanning, 8 Pa. Super. Ct. 27.

[10] 1890, Hennepin County v. Bell, 43 Minn. 344, 346, 45 N. W. 615.

[11] 1912, Mercersburg College v. Mercersburg Borough, 53 Pa. Super Ct. 388.

[12] 1911, McCullough v. Bennett Medical College, 248 Ill. 608, 94 N. E. 110, 140 Am. St. Rep. 237.

[13] 1885, Hebrew Free School Ass'n v. New York, 99 N. Y. 488, 2 N. E. 399.

[14] 1875, Hebrew Free School Ass'n v. New York, 4 Hun. 446, 450, 3 How. Prac. (N. S.) 448.

termination of the lease. It plainly could not buy what it owned.[15]

§ 748. **Property Let by a Charity for Profit.** The legislature may, in terms, exempt property leased by a charity for ordinary commercial purposes where the proceeds are used for charitable purposes.[16] It may exempt all property of a charitable institution, and thus accomplish the same result.[17] Under a charter exempting the college estate, or all the land of a charity, not exceeding a certain amount, a building in the business center of a city from which rent is received,[18] and a farm which has been leased to a tenant,[19] have been held to be exempt. The same is true where the revenue derived from such proprty is exempted in terms.[20] It has even been held in Tennessee that land leased to an outsider by a charity is exempt, though property used in "secular business" is expressly excluded from the exemption privilege.[21]

§ 749. **Leases to Subsidiaries of a Charitable Institution.** The internal arrangements, under which large schools are conducted, sometimes take the form of leases. This is of no importance, as the law looks to the substance, not the shadow. The medical department of a university is, therefore, exempt where the arrangement, which appears to result in an income, is merely an arrangement by which the financial results from the different departments of the university are distributed for the benefit of the whole without injustice to any of the parts.[1] Similarly, a leasing agreement of certain buildings of a college for the conduct of a preparatory school does not subject such buildings to taxation as they

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[15] 1875, New Orleans v. Russ, 27 La. Ann. 413.

[16] 1901, Staunton v. Mary Baldwin Seminary, 99 Va. 653, 39 S. E. 596.

[17] 1854, New Orleans v. Poydras Asylum, 9 La. Ann. 584.

[18] 1897, Brown University v. Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847. But see 1890, New Haven v. Sheffield Scientific School, 59 Conn. 163, 22 Atl. 156.

[19] 1828, Hardy v. Waltham, 24 Mass. (7 Pick.) 108.

[20] 1916, Adams County v. Catholic Diocese, 110 Miss. 890, 71 So. 17.

[21] 1906, Vanderbilt University v. Cheney, 116 Tenn. 259, 94 S. W. 90.

[1] 1863, Philadephia v. University of Pennsylvania, 44 Pa. (8 Wright) 360. But see 1853, Appeals from Taxation, 1 Phila. 418, 422 (Pa.).

are not used for profit.[2] A different situation, of course, exists where a school or a part of a school is leased to an individual who uses it for his own gain.[3]

§ 750. **Leases to Other Charitable Institutions.** One charity sometimes leases its property to another charity. The legal situation in such a case is not entirely clear. While it has been intimated in Missouri that such property will be exempt as property "exclusively used for purposes purely charitable,"[4] the Massachusetts court has held that the occupation by a parochial school of the property of another charity is not sufficient to exempt it.[5] In Illinois, it has been held that the property of a library association leased to a public library is not exempt.[6] Of course, a different situation exists where one charity (a theological seminary) is merged with another (a university).[7]

§ 751. **Apportionment. General Situation.** The Missouri court has held that the fact that the building of a charitable society is in part used for stores, theaters, offices, or similar purposes does not destroy the exemption where the income is devoted to charitable purposes.[8] There is little if any justification for such a holding. The opposite extreme, which makes the entire building taxable, far more commends itself and has been adopted in a number of cases.[9]

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[2] 1909, Kenyon College v. Schnebly, 31 Ohio Cir. Ct. Rep. 150, 155.

[3] 1854, State v. Ross, 24 N. J. Law (4 Zab.) 497, 503; 1892, Society for the Promotion of Learning v. New Brunswick, 55 N. J. Law (26 Vroom) 65, 25 Atl. 853; 1895, Philadelphia v. Overseers of Public Schools, 170 Pa. 257, 32 Atl. 1033, 29 L. R. A. 600. But see 1907, Commonwealth v. Hamilton College, 125 Ky. 329, 101 S. W. 405.

[4] 1900, Adelphia Lodge v. Crawford, 157 Mo. 356, 57 S. W. 1020.

[5] 1891, St. James Educational Institute v. Salem, 153 Mass. 185, 26 N. E. 636, 10 L. R. A. 573.

[6] 1895, People v. Peoria Mercantile Library Ass'n, 157 Ill. 369, 41 N. E. 557.

[7] 1893, Kochersperger v. Baptist Theological Union, 171 Ill. 304, 49 N. E. 559.

[8] 1882, North St. Louis Gymnastic Society v. Hudson, 12 Mo. App. 342 (Affirmed 85 Mo. 32). This case has been severely criticised in 1906, Gymnastic Ass'n v. Milwaukee, 129 Wis. 429, 109 N. W. 109. For Kentucky cases along somewhat similar lines see index under Kentucky.

[9] 1919, Amos v. Jacksonville Realty and Mortgage Co., 77 Fla. 403, 81 So. 524; 1882, State v. Board of Assessors, 34 La. Ann. 574; 1854, Detroit Young Men's Society v. Detroit, 3 Mich. 172; 1899, Auditor General v. Women's Temperance Ass'n, 119 Mich. 430, 78 N. E. 466; 1901, Ridgely Lodge v. Redus, 78 Miss. 352, 29 So. 163; 1852, Wyman v. St. Louis, 17 Mo. 335; 1916, Peo-

It has been stated that the exploiting of a building or a substantial part of it for business purposes does not come within the terms "actually used" for charitable purposes.[10] Other courts have intimated that at most the part not so leased is exempt.[11] This naturally leads to the conclusion that the part of such a building used for charitable purposes only is exempt.[12] Where, therefore, the legislature had power only to exempt property actually used for charitable purposes, "the property which is occupied for the execution of the charitable purposes of the institution may be exempted, but other property belonging to the association which is rented as stores, ballrooms or theaters cannot be exempted."[13] Illustrations of this middle ground are afforded by cases which have arisen in connection with Y. M. C. A. properties,[14] though it is not confined to them.[15] There can be no question but that this middle ground represents the better opinion and deserves universally to be adopted.

§ 752. **Apportionment. Practical Difficulties.** The question of exemption is not to be determined by the connectedness, entirety, or individuality of the different apartments, but by the appropriateness, adaptedness, consistency, com-

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ple v. Purdy, 158 N. Y. Supp. 551; 1887, Pittsburgh v. Mercantile Library Hall Co., 3 Pa. Co. Ct. Rep. 519; 1902, Hayes v. Lawrence County, 16 S. D. 219, 92 N. W. 16; 1906, Gymnastic Ass'n v. Milwaukee, 129 Wis. 429, 109 N. W. 109.

[10] 1915, Washington Camp v. Board of Equalization, 87 N. J. Law 53, 93 Atl. 856.

[11] 1888, Massenburg v. Grand Lodge, 81 Ga. 212, 7 S. E. 636; 1898, People v. Sayles, 53 N. Y. Supp. 67, 32 App. Div. 197 (affirmed 157 N. Y. 677, 51 N. E. 1093).

[12] 1901, Parker v. Quinn, 23 Utah 332, 64 Pac. 961.

[13] 1876, New Orleans v. St. Patrick's Hall Ass'n, 28 La. Ann. 512.

[14] 1916, Waycross v. Waycross Savings and Trust Co., 146 Ga. 68, 90 S. E. 382; 1895, People v. Y. M. C. A., 157 Ill. 403, 41 N. E. 557; 1894, Auburn v. Y. M. C. A., 86 Me. 244, 29 Atl. 992; 1900, Y. M. C. A. v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123; 1921, In re Y. M. C. A. Assessment, 106 Neb. 105, 182 N. W. 593; 1879, Y. M. C. A. v. Donahugh, 13 Phila. 12, 7 Wkly. Notes Cas. 208 (Pa.).

[15] 1878, Frederick County v. Sisters of Charity, 48 Md. 34; 1883, Baltimore v. Grand Lodge, 60 Md. 280; 1880, Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253, 260; 1894, Mercantile Library Co. v. Philadelphia, 161 Pa. 155, 28 Atl. 1068 (Affirming 14 Pa. Co. Ct. Rep. 204, 3 Pa. Dist. Rep. 139); 1918, Odd Fellows Building Ass'n v. Naylor, 53 Utah 111, 177 Pac. 214; 1917, I. O. O. F. v. Scott, 24 Wyo. 544, 163 Pac. 306.

patibility and necessity of the means to the end and object to be accomplished.[16] The fact that the building is so constructed that the parts leased or otherwise used with a view to profit cannot be separated from the residue by definite lines, is no obstacle to a valuation of such parts for the purposes of taxation, having due regard to the taxable value of the entire property.[17] "In such cases the assessor, in estimating the value of the property, should make a proper allowance for the portion of the building occupied by the society, so that the tax levied will be laid only upon the value of that which is not exempt, though the property may be assessed as a whole."[18] This will be particularly appropriate where the legislature has authorized some procedure for severance.[19] Accordingly, judgments apportioning the part of the building not used for charitable purposes at seventeen and one-half per cent[1] or fifty per cent[20] have been approved by the courts.

§ 753. **Endowment Funds. Investment. Generally.** Endowment funds present distinct problems radically different from those connected with any other property owned by a charitable foundation. Their one and only usefulness is to produce an income with which to sustain the charity. To achieve this purpose, they must be invested. There can be no doubt of the power of the legislature to exempt such funds and their proceeds.[2] There can also be no doubt as to the duty of the courts to follow the legislative direction. A denial of the exemption on the ground that the fund is used with a view to profit, would not be a construction of the statute, but a nullification of it.[3] Of course, where there is no express statute, courts may very well hold that such

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[16] 1859, State v. Elizabeth, 28 N. J. Law (4 Dutch) 103. (Reversed on the ground that the statute in question expressly covered such property, 1862, State v. Leester, 29 N. J. Law (5 Dutch) 541.)

[17] 1880, Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253, 261.

[18] 1895, Hibernian Benevolent Society v. Kelly, 28 Or. 173, 196, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167.

[19] 1906, Gymnastic Ass'n v. Milwaukee, 129 Wis. 429, 438, 109 N. W. 109.

[20] 1894, Auburn v. Y. M. C. A., 86 Me. 244, 248, 29 Atl. 992.

[1] 1906, Rohrbaugh v. Douglas County, 76 Neb. 679, 107 N. W. 1000.

[2] 1915, Myers v. Benjamin Rose Institute, 92 Ohio St. 238, 110 N. E. 929.

[3] 1911, Monticello Seminary v. Madison County, 249 Ill. 481, 94 N. E. 938.

funds are not exempt as being exclusively used for charitable purposes.[4] The mere fact, however, that the endowment is not a part of the original trust fund,[5] or that a profit results from its investment,[6] is immaterial. Certainly, the purposes of an endowed school can be accomplished "in the best manner" only by exempting from taxation all of its property, the income of which is exclusively devoted to the purpose of founding and maintaining it.[7]

§ 754. **Endowment Fund. Form of Exemption.** The form which this exemption has taken is quite diverse. In the above paragraphs a number of cases are cited in which the statute expressly mentions the fund. This, however, is not necessary. A provision exempting all the personal property of a charity will exempt a trust fund created by a will in favor of it,[8] though it is subject to annuities.[9] It has even been held that a constitutional exemption merely of "academies, colleges, universities and all seminaries of learning" exempts the endowment fund of such institution.[10]

§ 755. **Endowment Fund. Form of Property.** There must, however, be an express exemption clause of some kind for, until property gets into the form of the enumerated items or articles, no exemption can be granted. The tax officer may not spare "a form of property not enumerated because, for the time being, it represents a part or the whole of one or more of the forms which are enumerated. The exemption is not a release **in personam** but a release **in rem,** and the **res** to which the release applies must be found and identified by the officer, or no exemption can be recognized."[11] Though, therefore, a library when established will be exempt

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[4] 1901, National Council of Knights of Security v. Phillips, 63 Kans. 808, 66 Pac. 1014; 1883, State v. Board of Assessors, 35 La. Ann. 668.

[5] 1904, Michigan Sanitarium v. Battle Creek, 138 Mich. 676, 685, 101 N. W. 855.

[6] 1905, Little v. United Presbyterian Theological Seminary, 72 Ohio St. 417, 74 N. E. 193; 1909, State v. Watkins, 108 Minn. 114, 121 N. W. 390.

[7] 1903, Colorado Seminary v. Arapahoe, 30 Colo. 507, 515, 71 Pac. 410. Overruling 1889, County Commissioners v. Colorado Seminary, 12 Colo. 497, 21 Pac. 490.

[8] 1911, Watson v. Boston, 209 Mass. 18, 95 N. E. 302.

[9] 1888, Williston Seminary v. Hampshire County, 147 Mass. 427, 18 N. E. 210.

[10] 1903, Rice County v. Bishop Seabury Mission, 90 Minn. 92, 95 N. W. 882.

[11] 1887, Academy of Richmond County v. Bohler, 80 Ga. 159, 165, 7 S. E. 633.

the fund collected to build it will not for that reason be tax-free.[12] Conversely, though land is exempted, a fund realized by its sale will not be exempt.[13] Where only the land of a cemetery is exempted, a fund invested in various stocks is subject to taxation.[14]

§ 756. **Endowment Fund. Investment.** The question of the proper investment of such a fund is difficult. There can be no valid objection to investments in mortgages[15] or bonds. Whether, however, the fund may be invested by purchasing real estate outright presents a more difficult question. Certainly, where a statute limits the land which charitable societies are permitted to hold, and then exempts its "endowment or fund" land in excess of the statutory limit held as an investment, violates the policy of the law and is not exempt.[16] The same conclusion has been reached in the absence of such mortmain policy, whether the fund was invested in a business block from which rent was received,[17] or was used to erect a building for the general purposes of the charity.[18] On the other hand, a house, bought by a college with its endowment fund and leased to outsiders, has been held to be exempt,[19] while a provision exempting the property of a school, "including all income and proceeds," "used exclusively for the purpose of education," has been held to cover property leased for profit, since there can be no income from the college buildings proper.[20]

§ 757. **School Exemptions. Liberal Policy.** Many of the legislatures have been very liberal toward schools and have even expressly exempted educational institutions which

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12 1911, Stimson Memorial Library v. Union County, 248 Ill. 590, 94 N. E. 153.

13 1912, Gorham v. Ministerial Fund, 109 Me. 22, 82 Atl. 290.

14 1879, State v. Wilson, 52 Md. 638.

15 1899, Long Branch Firemen's Ass'n v. Johnson, 62 N. J. Law 625, 43 Atl. 573; 1903, Rice County v. Bishop Seabury Mission, 90 Minn. 92, 95 N. W. 882.

16 1876, Nevin v. Krollman, 38 N. J. Law (9 Vroom) 574 (affirming 38 N. J. Law 323).

17 1881, Ft. Des Moines Lodge v. Polk County, 56 Iowa 34, 8 N. W. 687.

18 1912, Life and Annuity Ass'n v. Shilling, 86 Kans. 299, 120 Pac. 548.

19 1912, Scott v. St. Johnsbury Academy, 86 Vt. 172, 84 Atl. 567.

20 1907, Whitman College v. Berryman, 156 Fed. 112, 118.

clearly had no charitable features.[1] This liberality has infected the courts, which accordingly have held a seminary exempt as a scientific institution[2] and have decided that the description "scientific and literary association" covers a school,[3] and that the exemption of a school covers a medical college.[4] A college, whose income from tuition more than paid for its running expenses, is exempt as applying such surplus to "increase the efficiency and facilities thereof," where it uses the money to enlarge its buildings, construct a gymnasium and athletic field, enhance its apparatus for physical training, and improve the methods of illuminating and decorating its grounds.[5]

§ 758. **School Exemption. Liberality not Unlimited.** This liberality, however, has its bounds. The use of the word "school" in a statute ordinarily implies an educational institution below the grade of a college in which elementary knowledge is imparted. A school of stenography and typewriting[6] and a business college[7] are not within it. Neither is a private school conducted for private gain exempt as a literary institution,[8] as an academy,[9] or as a seminary.[10] The fact that the owners realize a profit is important, and leads generally to a denial of the exemption.[11]

§ 759. **School Exemption. Stock Corporation.** The legal consequences of the ownership of a school by a stock cor-

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[1] 1917, Pitcher v. Miss Wolcott School Ass'n, 63 Colo. 294; 165 Pac. 608; 1902, Vink v. Work, 158 Ind. 638, 64 N. E. 83; 1893, Englewood School v. Chamberlain, 55 N. J. Law (26 Vroom) 292, 26 Atl. 913 (see 54 N. J. Law (25 Vroom) 549, 24 Atl. 479).

[2] 1889, Detroit Home and Day School v. Detroit, 76 Mich. 521, 43 N. W. 593, 6 L. R. A. 97.

[3] 1910, St. John's Military Academy v. Edwards, 143 Wis. 551, 128 N. W. 113, 139 Am. St. Rep. 1123.

[4] 1887, Omaha Medical College v. Rush, 22 Neb. 449, 35 N. W. 222.

[5] 1912, Mercersburg College v. Mercersburg Borough, 53 Pa. Super. Ct. 388, 397.

[6] 1894, Lichtentag v. Tax Collector, 46 La. Ann. 572, 15 So. 176.

[7] 1911, Parson's Business College v. Kalamazoo, 166 Mich. 305, 131 N. W. 553, 33 L. R. A. (N. S.) 921.

[8] 1856, Indianapolis v. McLean, 8 Ind. 328. But see 1865, Indianapolis v. Sturdevant, 24 Ind. 391.

[9] 1914, Brunswick School v. Greenwich, 88 Conn. 241, 90 Atl. 801.

[10] 1855, Chegary v. New York, 13 N. Y. (3 Kern) 220 (Reversing 9 N. Y. Super Ct. (2 Duer) 521).

[11] 1889, Montgomery v. Wyman, 130 Ill. 17, 22 N. E. 845; 1903, In re Dille, 119 Iowa 575, 93 N. W. 571; 1890, Henderson v. McCullagh, 89 Ky. 448, 12 S. W. 932, 12 Ky. Law Rep. 77.

poration are not entirely clear. A Pennsylvania lower court has held that such fact does not deprive the school of its charitable character so long as no surplus is sought to be created.[12] The Wisconsin court has even exempted a stock corporation which had declared dividends on two occasions and was incorporated for various purposes, though it limited its activities to conducting a school.[13] Georgia, on the other hand, has held such a corporation to be taxable though no dividends had ever been declared and donations had been accepted.[14] In New Jersey, it has been held that a school, incorporated under the general incorporation act, and conducted for profit, cannot acquire exemption by changing its corporate dress and altering its financial system so that the net income is disbursed in the form of interest on a mortgage instead of in the form of dividends.[15] In view of this contrariety of opinion, it will be well for educational institutions not to incorporate under the general incorporation statutes, but to obtain corporate capacity under statutes passed to enable charitable societies to acquire a legal existence.[16]

§ 760. **Y. M. C. A. Properties.** Y. M. C. A. properties are generally exempted as public charities,[17] and this, of course, equally applies to a Y. W. C. A.[18] This tendency is so strong that the Kentucky court has held that such an association is exempt from a license tax in regard to a restaurant conducted by it.[19] Other courts discriminate against those portions of Y. M. C. A. properties leased for commercial purposes and exempt only the balance.[20] The New York

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[12] 1905, Pocono Pines Assembly v. Monroe County, 29 Pa. Super. Ct. 36, 43.

[13] 1910, St. John's Military Academy v. Edwards, 143 Wis. 551, 128 N. W. 113, 139 Am. St. Rep. 1123.

[14] 1904, Brenau Ass'n v. Harbison, 120 Ga. 929, 48 S. E. 363.

[15] 1914, Montclair v. State Board of Equalization, 86 N. J. Law 497, 92 Atl. 270 (affirmed 88 N. J. Law 374, 96 Atl. 589).

[16] See 1874, Beaver County v. Geneva College, 2 Pa. Dist. Rep. 70, 23 Pittsburg Legal J. 86.

[17] 1912, Little v. Newburyport, 210 Mass. 414, 96 N. E. 1032; 1903, Commonwealth v. Y M. C. A., 116 Ky. 711, 76 S. W. 522, 105 Am. St. Rep. 234; 1912, Little v. Newburyport, 210 Mass. 414, 96 N. E. 1032; 1879, Y. M. C. A. v. Donohugh, 13 Phila. 12, 7 Wkly. Notes Cas. 208 (Pa.).

[18] 1889, Philadelphia v. Woman's Christian Ass'n, 125 Pa. 572, 17 Atl. 475.

[19] 1918, Corbin Y. M. C. A. v. Commonwealth, 181 Ky. 384, 205 S. W. 388. But see 1921, **In re** Y. M. C. A. Assessment, 106 Neb. 105, 182 N. W. 593.

[20] See Sections 751 to 752 of this book.

court, however, though admitting that a Y. M. C. A. is a religious society, blending amusement with instruction, and making both subservient to the ultimate end of bringing its beneficiaries under distinctly Christian influence, has reluctantly held that it is taxable, as it is not used exclusively for religious purposes.[21] A like result has been reached by the New Jersey court on the ground that, with slight exceptions, those who use its privileges are not the recipients of charity, but purchasers of the right to use it at a price deemed adequate.[1]

§ 761. **Club Rooms of Fraternal Orders.** Many lodges maintain club rooms. It is clear that such rooms are conducted for the benefit of its members only and hence are not exempt,[2] though they incidentally dispense some charity.[3] This latter fact no more exempts such rooms than would continuous family worship in a dwelling house exempt it.[4]

§ 762. **Greek Letter Fraternity Houses.** One form of club house is the well-known Greek Letter Fraternity House which flourishes in connection with American universities. Such institution is primarily a place for rest, recreation, and fraternal intercourse, and though it contains a library, is not exempt as being used exclusively for literary purposes.[5] Though erected on the land of a university, it is rather a private boarding house than a literary or scientific institution.[6] The mere fact that some literary work is carried on

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[21] 1889, Y. M. C. A. v. New York, 113 N. Y. 187, 21 N. E. 86.

[1] 1898, Y. M. C. A. v. Peterson, 61 N. J. Law 420, 39 Atl. 655 (affirmed 64 N. J. Law 361 45 Atl. 1092). The New York Supreme Court has held that a Y. W. C. A. is not a "social settlement" within an exemption from water duties. 1912, In re Y. W. C. A., 141 N. Y. Supp. 138, 156 App. Div. 295 (Affirmed 209 N. Y. 534, 102 N. E. 1118); 1912, In re Y. W. C. A., 141 N. Y. Supp. 260 (Affirmed 142 N. Y. Supp. 1151).

[2] 1917, Vogt v. Louisville, 173 Ky. 119, 190 S. W. 695; 1914, Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453; 1904, Green Bay Lodge v. Green Bay, 122 Wis. 452, 100 N. W. 837, 106 Am. St. Rep. 984.

[3] 1916, New Standard Club v. McGowen, 11 Miss. 92, 71 So. 289; 1917, People v. Purdy, 167 N. Y. Supp. 285, 179 App. Div. 805 (Affirmed 224 N. Y. 710).

[4] 1914, St. Louis Lodge v. Koeln, 262 Mo. 444, 171 S. W. 329, L. R. A. 1915, C. 694, Ann. Cas. 1916, E. 784.

[5] 1902, People v. Lawlor, 77 N. Y. Supp. 840, 74 App. Div. 553 (affirmed 179 N. Y. 535, 71 N. E. 1136).

[6] 1909, Oronto v. Sigma Alpha Epsilon Society, 105 Me. 214, 74 Atl. 19. Followed 1911, Oronto v. Kappa Sigma Society, 108 Me. 320, 80 Atl. 831.

within it, will not exempt it where the dominant purpose is not educational.[7] Of course, the mere fact that members of a fraternity house eat and sleep at the house does not make that the dominant purpose. "Every human being must eat and sleep to live; but this does not make the dominant purpose of life eating and sleeping."[8] A statute may, therefore, exempt buildings used exclusively by university societies as a literary hall or dormitory.[9]

§ 763. **Cemeteries. General Situation.** There are strong, if not overwhelming, reasons for the exemption of cemetery grounds. A tax sale of such land and its consequent desecration by an unfeeling purchaser is repulsive. It has, therefore, been held to be exempt without any special provision to that effect. This has been done on the theory that the lawmakers did not think of the family burying ground and the churchyard as property. They not only thought that they should not be taxed, but, following the natural impulses of the race, did not think it necessary even to say in words that they should be exempt.[10] Cemetery lands have, therefore, even been held to be exempt from assessments.[11]

§ 764. **Cemeteries. Tests of Exemption. Dedication.** Ownership and use of land for cemetery purposes are the ordinary statutory tests of exemption. "The mere organization of a company, under the cemetery acts, and the purchase of land thereafter, without expenditure to improve or develop it, but the mere passive holding of the land, as it were, by a species of mortmain, is not enough to bring the claim for exemption within the language and spirit of this legislation."[12] Where, therefore, land "dedicated" to cemetery purposes is exempted, a mere appropriation on paper is not enough. Even the use of a parcel of it for growing

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[7] 1903, Phi Beta Epsilon Corporation v. Boston, 182 Mass. 457, 65 N. E. 824.

[8] 1920, State v. Allen, 189 Ind. 369, 127 N. E. 145, 146.

[9] 1914, Kappa Kappa Gamma House v. Pearcy, 92 Kans. 1020, 142 Pac. 292, 52 L. R. A. (N. S.) 995. See also 1914, People v. Parker, 146 N. Y. Supp. 753, 84 Misc. 534. The referee whose opinion is adopted in this case by the court was Irving G. Vann, formerly a judge of the New York Appellate Court.

[10] 1906, Oak Hill Cemetery Co. v. Wells, 38 Ind. App. 479, 481, 78 N. E. 350.

[11] 1908, In re New York City, 192 N. Y. 459, 85 N. E. 755.

[12] 1917, Fairview Heights Cemetery v. Fay, 90 N. J. Law 427, 429, 101 Atl. 405 (affirmed 91 N. J. Law 687, 688, 106 Atl. 891).

trees or shrubs, cutting turf, and depositing stone, wood, and other materials, to be ultimately used in preparing and ornamenting it, is not sufficient. The land, in order to be exempt, must actually be used for burial, or at least divided off, or at least laid out into lots and avenues.[13] Where places of burial "not held for private or corporate profit" are exempt, it must be averred that such place is not so held in order to obtain the exemption.[14]

§ 765. **Cemetery. Extent of Use for Graves.** The extent to which the land is actually used for graves will of necessity be a varying quantity. An old cemetery will naturally contain many graves, while only a few will be situated on a new one. This latter fact will not make the cemetery taxable in part. "What would be the security of those who venerate their dead, if the tax-gatherer might enter such sacred precincts and sell, at public outcry, the land adjoining their tombs to some publican who might build thereon a bar-room or a brothel?"[15] While, therefore, a cemetery corporation is not exempt on such part of its grounds as are not used for burial purposes at all,[16] property, reasonably necessary for the present use of an existing cemetery, is exempt as soon as it is acquired and need not be platted or used.[17] It has even been held that, where the tract bought for a cemetery is reasonable in extent, a five acre tract containing the house of the attendant is exempt, though it is actually being farmed, since a reasonable amount of land for future occupancy may be provided.[18]

§ 766. **Cemetery. Distinct Tracts of Land not yet Used.** The situation is different where the additional land is very extensive, or not immediately necessary, or has been acquired by a subsequent deed, or is separated from the cemetery by a road, street, railroad track, or other obstruction. On this ground, an eighty acre tract of land on which no lots had

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[13] 1875, Woodlawn Cemetery v. Everett, 118 Mass. 354.

[14] 1900, Negley v. Henderson, 21 Ky. Law Rep. 1394, 55 S. W. 554.

[15] 1885, Metairie Cemetery Ass'n v. Board of Assessors, 37 La. Ann. 32, 35.

[16] 1906, Oak Hill Cemetery Co. v. Wells, 38 Ind. App. 479, 78 N. E. 350.

[17] 1904, State v. Lakewood Cemetery Ass'n, 93 Minn. 191, 101 N. W. 161.

[18] 1881, Hoboken v. North Bergen Twp., 43 N. J. Law (14 Vroom) 146.

been sold or offered for sale has been taxed as not being "subservient to burial uses."[19] The same has been done with a 152 acre tract platted for cemetery purposes, but not used as such, and separated from the existing cemetery by a road.[20] A piece of land, separated from the cemetery by railroad tracks, which has been acquired by a subsequent deed, and is subject to the ebb and flow of the tide, and has been redeemed only in part, is in the same class.[21] The mere fact that some preliminary work has been done on a separate tract acquired by a cemetery association is not sufficient to exempt it.[1]

§ 767. **Cemeteries. Improvements.** It need hardly be mentioned that such exemptions embrace the permanent improvements on such cemeteries which are used for its purposes and are essential to it,[2] such as a greenhouse[3] and a funeral chapel,[4] but not a separate though adjoining lot used for the office and dwelling of its custodian and to supply water,[5] particularly where such land is leased to the sexton at a stipulated rental and is used as a garden.[6]

§ 768. **Cemeteries. Mausoleums.** Mausoleums have come into use for burial purposes, and the question of their exemption has arisen. The New Jersey court has strongly leaned against such exemption, holding that a mausoleum, containing four hundred crypts and built as a commercial enterprise by a business corporation on the grounds of a cemetery, is not exempt as a "building for cemetery use."[7] Even after the legislature had amended the statute so as to make it exempt all mausoleums "now erected, or which may hereafter be erected and located within any duly authorized

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19 1893, Rosehill Cemetery Co. v. Kern, 147 Ill. 483, 35 N. E. 240.

20 1877, People v. Graceland Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32.

21 1916, Mt. Pleasant Cemetery Co. v. Newark, 89 N. J. Law 255, 98 Atl. 448.

1 1894, German Evangelical Protestant Cemetery v. Brooks, 8 Ohio Cir. Ct. Rep. 439, 4 Ohio Cir. Ct. Dec. 478.

2 1879, Appeal Tax Court v. Baltimore Cemetery Co., 50 Md. 432.

3 1904, State v. Lakewood Cemetery Ass'n, 93 Minn. 191, 101 N. W. 161.

4 1854, Trinity Church v. New York, 10 How. Prac. 138 (N. Y.).

5 1897, Bloomington Cemetery Ass'n v. Baldridge, 170 Ill. 377, 48 N. E. 905.

6 1885, State v. Lange, 16 Mo. App. 468. But see 1881, Hoboken v. North Bergen Twp., 43 N. J. Law (14 Vroom) 146.

7 1915, Mausoleum Builders v. State Board, 88 N. J. Law 592, 96 Atl. 494.

cemetery," it has confined the operation of the statute to mausoleums erected by cemetery associations and denied exemption to commercial ventures, though erected on cemetery grounds.[8] On the other hand, the Kansas[9] and Georgia[10] courts have held that a mausoleum with many crypts is exempt as land used exclusively as a graveyard.

§ 769. **Cemeteries. Personal Property.** The reasons above stated for the exemption of cemetery lands do not apply to personal property such as horses, carriages, automobiles, and tools that may be owned by cemetery organizations. Says the New Jersey court: "It is in accordance with the common wish of mankind that the places where the dead are buried should be protected and preserved against the interference of possible sales for unpaid taxes, or under execution for debts, and be kept free from all molestation or desecration. These legislative exemptions of cemetery property are the expression of that wish. But, it is not perceived how that wish is made effectual by exemption from taxation of property not used for burial places that has no associations connected with it, and may be disposed of by the association at any time, to any person for any purpose."[11] Though a statute, therefore, exempts a cemetery and its improvement fund, it does not exempt its other personal property.[12] Whether such a fund itself is exempt, will depend upon the local statutes. It has been exempted in Indiana[13] and taxed in Kentucky.[14] In another Indiana case, it has been held that, where a lodge buys a cemetery and invests part of the proceeds in a business block, such block is not exempt as the fund of a cemetery association.[15]

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[8] 1919, Totawa v. State Board, 92 N. J. Law 646, 106 Atl. 18.

[9] 1918, Gray v. Craig, 103 Kans. 100, 172 Pac. 1004.

[10] 1918, Georgia Mausoleum Co. v. Dublin, 147 Ga. 652, 95 S. E. 233.

[11] 1906, Rosedale Cemetery Ass'n v. Linden, 73 N. J. Law 421, 422, 63 Atl. 904. See also 1912, Milford v. Worcester County, 213 Mass. 162, 100 N. E. 60; 1908, State v. Casey, 210 Mo. 235, 109 S. W. 1; 1918, Hollywood Cemetery Co. v. Commonwealth, 123 Va. 106, 96 S. E. 207.

[12] 1913, Forest Hill Cemetery Co. v. Creath, 127 Tenn. 686, 157 S. W. 412.

[13] 1911, Greenbush Cemetery Ass'n v. Van Natta, 49 Ind. App. 192, 94 N. E. 899.

[14] 1902, Commonwealth v. Lexington Cemetery Co., 114 Ky. 165, 70 S. W. 280, 24 Ky. Law Rep. 924.

[15] 1919, La Fontaine Lodge v. Eviston, 71 Ind. App. 445, 123 N. E. 468.

§ 770. **Cemeteries. Sale of Lots.** It is common knowledge that lots in most cemeteries are sold in advance of need. This practice enables families to be buried together and makes it possible for the survivors to visit the graves in the greatest comfort. It also gives the purchasers an incentive to keep their plot of ground in good condition and thus contributes to the purposes for which the cemetery is established. While there may be extraordinary circumstances under which the fact that lots are sold will result in taxation,[16] ordinarily this is not the case.[17]

§ 771. **Secret Societies. Exemption.** The exemption of the property of fraternal orders presents grave difficulties. The aspects presented by them are so manifold that it is very difficult to classify them. They afford club life and insurance to their members, but also administer charity and impart educational and even religious or semi-religious culture. Courts, in consequence, have been perplexed in their attempts to determine their status. "It has been a matter of grave judicial discussion whether Masonic institutions, or others which confine their benefits to members of the given associations, are institutions of purely or even of public charity at all."[18] While the Tennessee court has held that the property of a lodge of Masons is tax-free as a purely public charity,[19] other courts have denied the exemption.[20] Says the Kentucky court: "The public is interested in the relief of its members, because they are men, women and children, not because they are Masons."[21]

§ 772. **Masonic Lodge. Not Religious Organization.** The Nebraska court has held that a Masonic lodge is not exempt as a religious organization. Though it inculcates a belief in a God and in a future state, its guiding thought is not religion but religious toleration. A fraternity broad enough

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[16] 1910, Simcoke v. Sayre, 148 Iowa 132, 126 N. W. 816. See also 1888, Brown v. Pittsburgh, 16 Atl. 43 (Pa.).

[17] 1885, Metairie Cemetery Ass'n v. Board of Assessors, 37 La. Ann. 32.

[18] 1888, Massenburg v. Grand Lodge, 81 Ga. 212, 216, 7 S. E. 636.

[19] 1912, Cumberland Lodge v. Nashville, 127 Tenn. 248, 154 S. W. 1141.

[20] 1917, Merrick Lodge v. Lexington, 175 Ky. 275, 194 S. W. 92; 1872, Morning Star Lodge v. Hayslip, 23 Ohio St. 144. See 1922, Wilson v. Licking Aerie, 104 Ohio St. 137, 135 N. E. 545.

[21] 1900, Newport v. Masonic Temple Ass'n, 108 Ky. 333, 338, 339, 56 S. W. 405, 49 L. R. A. 252, 21 Ky. Law Rep. 1785.

to cover with its mantle the Christian, Moslem and Jew, without requiring either to renounce his religion, is not a religious organization, though its members may join in prayer. Its belief in immortality is more an instinct of the human soul than a religious dogma. Its exclusion of the public from its meetings is another indication that public worship is not conducted by it.[22]

§ 773. **Secret Societies. Not Purely Public Charities.** The result in some of the cases is largely due to the fact that only "purely public charities" were exempted. The words "purely public" must be given a meaning. The Colorado court has very clearly done this. It has held a Masonic hall to be exempt as used "for strictly charitable purposes," and has distinguished cases which deny the exemption on the ground that the statute exempted only purely public charities.[1] While the Maine court in an able opinion[2] has refused to recognize this distinction, other courts have adopted it.[3] Says the Indiana court: "If one organization may confine itself to a sex, or church, or city, why not to a given fraternity?"[4] The omission of the words "exclusive" and "public" has been stressed by the West Virginia court in upholding the exemption of the temple property of a Masonic lodge.[5]

§ 774. **Homes Maintained by Secret Societies.** The Pennsylvania court, over the dissent of two of its members, has disagreed with the above dictum of the Indiana court in a case where a Masonic home was in question, saying: "When the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large."[6] The Illinois

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[22] 1921, Scottish Rite Bld. Co., v. Castor County, 106 Neb. 95, 182 N. W. 574.

[1] 1918, Horton v. Colorado Springs Masonic Bldg. Soc., 64 Colo. 529, 173 Pac. 61.

[2] 1882, Bangor v. Masonic Lodge, 73 Me. 428, 40 Am. Rep. 369.

[3] 1882, State v. Board of Assessors, 34 La. Ann. 574, 575; 1884, State v. Central St. Louis Masonic Hall Ass'n, 14 Mo. App. 597; 1900, Fitterer v. Crawford, 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191; 1907, Plattsmouth Lodge v. Cass County, 79 Neb. 463, 113 N. W. 167; 1916, Linde v. Packard, 35 N. D. 298, 160 N. W. 150.

[4] 1865, Indianapolis v. Grand Lodge, 25 Ind. 518, 522, 523.

[5] 1922, In re Masonic Temple Society, 90 W. Va. 441, 111 S. E. 637.

[6] 1894, Philadelphia v. Masonic Home, 160 Pa. 572, 578, 28 Atl. 954, 23 L. R. A. 545, 40 Am. St. Rep. 736.

court has expressly disagreed with this conclusion,[7] while other courts have decided that such a home is exclusively used for charitable purposes,[8] is a public charity,[9] or even an institution of purely public charity.[10]

§ 775. **Secret Societies. Insurance.** Where the insurance affected by a fraternal order is its outstanding or even its only feature, a different question is presented. Where a lodge is a mutual insurance company, it is not exempt[11] as a charity,[12] as a public charity,[13] or as an institution used exclusively for charitable purposes.[14]

§ 776. **Inheritance Tax. Distinguished from Other Taxes.** An inheritance tax is clearly distinct from any other form of taxation. It is not a tax on property, but on the right to transfer it by will or under the interstate laws.[15] It is a "diminution of the amount that otherwise would pass under the will or other conveyance, and hence that which the legatee really receives is not taxed at all."[16] It follows that statutes exempting the property of charitable institutions do not **per se** confer exemption from the inheritance tax.[17] "It is illogical and unreasonable to conclude, that because the property of such institutions, after it is acquired, is exempted from taxation, that, therefore, they would be

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[7] 1917, Grand Lodge v. Moultrie County, 281 Ill. 480, 117 N. E. 1016.

[8] 1910, Kansas Masonic Home v. Sedgwick County, 81 Kans. 859, 106 Pac. 1082.

[9] 1909, Masonic Education and Charity Trust v. Boston, 201 Mass. 320, 87 N. E. 602.

[10] 1907, Widows' and Orphans' Home v. Commonwealth, 126 Ky. 386, 31 Ky. Law Rep. 775, 103 S. W. 354. See also 1874, Savanna v. Solomon Lodge, 53 Ga. 93. But see 1901, Widows' and Orphans' Home v. Bosworth, 112 Ky. 200, 65 S. W. 591, 23 Ky. Law Rep. 1505.

[11] 1906, Royal Highlanders v. State, 77 Neb. 18, 108 N. W. 183, 7 L. R. A. (N. S.) 380.

[12] 1894, Young Men's Protestant Temperance Society v. Fall River, 160 Mass. 409, 36 N. E. 57.

[13] 1906, Supreme Lodge v. Effingham County, 223 Ill. 54, 79 N. E. 23.

[14] 1902, Catholic Knights v. Effingham County, 198 Ill. 441, 64 N. W. 1104.

[15] 1898, **In re** Kimberly, 50 N. Y. Supp. 586, 589, 27 App. Div. 470; 1904, Humphreys v. State, 70 Ohio St. 67, 84, 70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888, 1 Ann. Cas. 233; 1910, **In re** McKennan, 25 S. D. 369, 126 N. W. 611; 1904, **In re** Hickok, 78 Vt. 259, 62 Atl. 724, 6 Ann. Cas. 578.

[16] 1900, **In re** Finnen's Estate, 196 Pa. 72, 75, 46 Atl. 269.

[17] 1913, Washington County Hospital Ass'n v. Mealey, 121 Md. 274, 88 Atl. 136.

relieved from paying a premium or tax on the civil right or privilege of acquiring property by devise."[18]

§ 777. **Inheritance Tax. Liberal Construction. General Principles.** We have already seen that there is a strong tendency to relax the strict rule of construction where charities are in question.[19] This tendency is particularly strong in regard to inheritance taxes. The fact that the statute exempts charitable bequests from the payment of the inheritance tax, is no reason for departing from or modifying the ancient rule of construction favoring them.[20] "The legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical, and unnecessary construction."[21] An inheritance tax, being special taxation, must be strictly construed against the government and liberally toward the taxpayer.[22] "Reasons of public policy no less potent than those requiring strict construction of statutes exempting from general taxation demand liberality in dealing with exemptions relating to charitable legacies."[1] Charities relieve human misery and labor in unselfish devotion to improve the moral and physical condition of mankind, and are alike the fruit and aids of good government, and, hence, to relieve their property, whether it is in possession or expectancy, from taxation, is scarcely less the duty than it is the privilege of the enlightened legislator.[2] Therefore, the New York supreme court says that the legislature never intended "to tax benevolently inclined people for the privilege of making legacies designed to relieve the state of its burdens. No more effectual way of stopping such benevolence could be well devised. While the courts have no power to prevent the legislature from establishing such a greedy and foolish

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[18] 1876, Miller v. Commonwealth, 68 Va. (27 Gratt.) 110, 117, 118. Similarly, a corporation exempted from taxation has been held subject to the income tax because its profits were invested in the plant, thus redounding to the advantage and profit of the stockholders. 1919, St. John's Military Academy v. Larson, 168 Wis. 357, 170 N. W. 269.

[19] Sections 690 to 696, supra.

[20] 1909, In re Graves, 242 Ill. 23, 27, 89 N. E. 672, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302.

[21] 1908, Carter v. Whitcomb, 74 N. H. 482, 487, 69 Atl. 779, 17 L. R. A. (N. S.) 733.

[22] 1898, In re Kimberly, 50 N. Y. Supp. 586, 27 App. Div. 470.

[1] 1915, In re Curtis, 88 Vt. 445, 450, 92 Atl. 965.

[2] 1901, In re Huntington, 168 N. Y. 399, 407, 61 N. E. 643.

policy, they should not by construction impute such an intention in cases where it does not clearly appear."[3] Even a compromise made by a charity with the next of kin will, therefore, be treated but as an assignment so as to exempt the sum covered by it from the inheritance tax.[4] The fact that the character of a charity may be changed in the future is no ground to tax it.[5] Of course, where a testatrix has failed to pay certain taxes in her lifetime, and leaves a portion of her estate to charity, such charity takes such portion subject to its proper proportion of the tax which the testatrix should have paid in her lifetime.[6] However, where testator, who is survived by near relatives, gives more than the proportion which the law allows to charity, such excess need not pay an inheritance tax when the heirs waive their rights in favor of the charity.[7]

§ 778. **Inheritance Tax. Liberal Construction. Illustrations. Almshouse.** Illustrations are afforded by the decided cases in great number. An archbishop or cardinal archbishop is covered by the word "bishop."[8] An orphan farm school is exempt as a house of industry.[9] The New York Metropolitan Museum of Art is an educational institution within its meaning.[10] Corporations receive "state aid" within the meaning of the law, although the state merely exempts their property from taxation.[11] An unincorporated society may be exempt as a "charitable or educational society or institution created and existing under and by virtue of the laws of the state."[12] Where an almshouse is exempted, an institution for the blind which receives no pay from its

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[3] 1910, **In re** Moore, 122 N. Y. Supp. 828, 832, 66 Misc. 116 (Affirmed 128 N. Y. Supp. 1135, 143 App. Div. 973).

[4] 1915, **In re** Murray, 155 N. Y. Supp. 185, 92 Misc. 100.

[5] 1921, **In re** Foss, 114 Wash. 681, 196 Pac. 10.

[6] 1922, **In re** La Fevre, 233 N. Y. 301.

[7] 1922, **In re** DeLamar, 197 N. Y. Supp. 412, 118 Misc. Rep. 127.

[8] 1899, **In re** Kelly, 60 N. Y. Supp. 1005, 29 Misc. 169.

[9] 1889, **In re** Herr, 7 N. Y. Supp. 852, 55 Hun. 167, 32 N. Y. St. Rep. 724.

[10] 1909, **In re** Mergentime, 113 N. Y. Supp. 948, 953, 129 App. Div. 367 (affirmed 195 N. Y. 572, 88 N. E. 1125).

[11] 1917, Corbin v. Baldwin, 92 Conn. 99, 101 Atl. 834. To be thus exempted they, however, must own taxable property. 1920, Corbin v. American Industrial Bank and Trust Co., —— Conn. ——, 110 Atl. 459.

[12] 1915, **In re** Curtis, 88 Vt. 445, 451, 92 Atl. 965.

beneficiaries,[13] a consumptive home whose inmates are entirely supported by charity,[14] and a hospital for sick and disabled and indigent persons,[15] have been held to be included. A corporation to be constituted in the future may be exempt as a charitable corporation.[16] The question whether the fact that some benefit is derived from the beneficiaries deprives the institution of its character as an almshouse, has generally been answered in the affirmative.[17]

§ 779. **Inheritance Tax. Liberal Construction. Limitation.** The liberal rule of construction must not be stretched beyond its legitimate scope. There must be a statute before it can apply. While public corporations, such as a state university and a county, are impliedly exempt,[18] only express exemption will suffice in the case of a privately conducted charitable institution.[19] The word "exempted" by law from taxation "looks to some actual provision of the law, not to the mere absence of any provision, and it cannot be argued that because the law does not specifically tax a corporation, therefore that corporation is exempted."[20] A special direct exemption must, therefore, be pointed out.[1] "One claiming exemption must find plain warrant for it in the law. Doubtful language will not suffice."[2] It follows that where no exception is made in favor of religious or charitable institutions, they must pay the tax.[3] A bequest for masses has,

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[13] 1890, **In re** Underhill, 20 N. Y. Supp. 134, 2 Con. Sur. 262.

[14] 1890, **In re** Herr, 10 N. Y. Supp. 680, 57 Hun. 591, 32 N. Y. St. Rep. 724.

[15] 1889, **In re** Curtis, 7 N. Y. Supp. 207, 1 Con. Sur. 471.

[16] 1922, **In re** La Fevre, 233 N. Y. 138, 135 N. E. 203.

[17] 1890, **In re** Keech, 11 N. Y. Supp. 265, 57 Hun. 588, 32 N. Y. St. Rep. 277; 1890, **In re** Vanderbilt, 10 N. Y. Supp. 239, 2 Con. Sur. 319; 1890, **In re** Lenox, 9 N. Y. Supp. 895, 31 N. Y. St. Rep. 959.

[18] 1909, **In re** Mack, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207. Another method of solving the difficulty has been to hold that the board of supervisors of a county is a charitable society or institution so as to exempt a gift to it for the poor of the county from the inheritance tax. 1910, **In re** Spangler, 148 Iowa 333, 127 N. W. 625.

[19] 1889, **In re** Keith, 5 N. Y. Supp. 201, 1 Con. Sur. 370, 22 N. Y. St. Rep. 337.

[20] 1887, Church Charity Foundation v. People, 6 Dem. Sur. 154, 156 (N. Y.).

[1] 1889, **In re** Kavanagh, 6 N. Y. Supp. 669, 24 N. Y. St. Rep. 404.

[2] 1891, **In re** Forrester, 12 N. Y. Supp. 774, 475, 58 Hun. 611, 35 N. Y. St. Rep. 776.

[3] 1909, Leavell v. Arnold, 131 Ky. 426, 115 S. W. 232; 1856, Barringer v. Cowan, 55 N. C. 486.

therefore, been held to be taxable.[4] The mere fact that the real estate of a church is exempt, does not exempt a gift of personal property to it from taxation.[5] Where gifts to a hospital corporation are exempted, the exemption must be determined by the identity of the beneficiary, and not by the purpose of the transfer. Hence, a gift to a city for a hospital is not exempt.[6] Where a corporation which "receives state aid" is exempted, a charitable corporation which has no property to be exempted does not receive state aid and must pay the tax.[7]

§ 780. **Inheritance Tax. Power to Discriminate Against Foreign Charities.** There is a marked tendency to discriminate against the charities of other states and to exempt only domestic charities. There is no objection to such discrimination, so far as the federal courts are concerned. The power of the states to discriminate between classes "is not unconstitutionally exercised by legislation which exempts the religious and educational institutions of the state from an inheritance tax and subjects educational and religious institutions of other states to the tax."[8] This tendency is not confined to the legislatures, but largely controls the courts. A state statute, granting powers and privileges to corporations, will, in the absence of plain indications to the contrary, be applied only to corporations created by the state which are subject to its visitation and control.[9] Says the Illinois court: "The lawmaking power would find many weighty considerations authorizing the classification of foreign and domestic corporations into different classes, and justifying the creation of liability on the part of foreign corporations to pay a tax on the right to take property by descent, devise, or bequest, under the laws of the state, and

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[4] 1886, Seibert's Appeal, 6 Atl. 105, 106 (Pa.).

[5] 1890, Sherrill v. Christ Church, 121 N. Y. 701, 2 Silvernail Ct. App. 55, 25 N. E. 50. See 1910, In re Crawford, 148 Iowa 60, 126 N. W. 774, 23 Ann. Cas. 992.

[6] 1919, In re Miller, 178 N. Y. Supp. 554, 109 Misc. 267.

[7] 1920, Corbin v. American Industrial Bank and Trust Co., 95 Conn. 50, 110 Atl. 459.

[8] 1906, Board of Education v. Illinois, 203 U. S. 553, 561, 51 L. Ed. 314, 27 S. Ct. 171 (Affirming 1905, In re Speed, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189).

[9] 1893, In re Prime, 136 N. Y. 347, 360, 32 N. E. 1091, 18 L. R. A. 713.

at the same time leaving the right of a domestic corporation so to take, free of any such exaction.[10] Where, however, the statute among a number of absolute exemptions exempts municipal corporations **within the state,** these words apply only to municipal corporations and do not make a gift to a church outside of the state taxable.[11] It has been held, therefore, in Kentucky that a gift to a foreign orphanage is not exempt under the constitution, though it is a public charity under the statute.[12]

§ 781. **Inheritance Tax. "Exempted by Law."** Many state statutes exempt from the inheritance tax property given to institutions "now exempted by law from taxation." This provision has been construed universally to refer to the law of the forum, and not to the law of a sister state, and has resulted in the taxation of gifts to charitable corporations of sister states exempted by their own law from taxation.[13] Says the New Hampshire court: "The benefit to the public of this state of such a trust is so visionary, problematical, and uncertain that it cannot be deemed for the purpose of this case a public charity, without imputing to the legislature motives which it is reasonably certain they did not entertain."[14] It has been held in Massachusetts, therefore, that a legacy to Bowdoin College in Maine is not exempt, though Massachusetts, while Maine was still a part of it, had actually exempted the college from taxation.[15] Even a bequest to keep testator's grave in good condition has been held to be taxable where the legatee was a corporation of another state.[16] Where, on the other hand, a foreign corporation has

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[10] 1905, **In re** Speed, 216 Ill. 23, 28, 74 N. E. 809, 108 Am. St. Rep. 189 (Affirmed 203 U. S. 553, 51 L. Ed. 314, 27 S. Ct. 171).

[11] 1922, Sage Executors v. Commonwealth, 196 Ky. 257, 244 S. W. 779. Followed 1922, Bingham's Adm. v. Commonwealth, 196 Ky. 318, 244 S. W. 781.

[12] 1909, Green v. Fidelity Trust Co., 134 Ky. 311, 329, 120 S. W. 283.

[13] 1894, Minot v. Winthrop, 162 Mass. 113, 126, 38 N. E. 512, 26 L. R. A. 259; 1889, Catlin v. Trinity College, 113 N. Y. 133, 20 N. E. 864, 3 L. R. A. 206; 1904, **In re** Hickok, 78 Vt. 259, 62 Atl. 724, 6 Ann. Cas. 578; 1919, **In re** Petersen, 186 Iowa 75, 172 N. W. 206; but see 1918, **In re** Petersen, 166 N. W. 168 (Iowa).

[14] 1908, Carter v. Whitcomb, 74 N. H. 482, 490, 69 Atl. 779, 17 L. R. A. (N. S.) 733.

[15] 1902, Rice v. Bradford, 180 Mass. 545, 63 N. E. 7.

[16] 1909, **In re** Fay, 116 N. Y. Supp. 423, 62 Misc. 154.

been actually reincorporated in the state, it may take a gift the same as if it had been originally chartered there.[17]

§ 782. **Inheritance Tax. Power to Exempt Foreign Charities.** What has just been said must not be taken to imply that the various states have no power to exempt foreign corporations from the inheritance tax. Such power is in existence, though it is sparingly exercised. It has, therefore, been held that, where a foreign corporation is exempted, the test is not incorporation under an act permitting incorporation for objects that would exempt, but incorporation for objects that entitle to exemption.[18]

§ 783. **Inheritance Tax. Corporation Active Beyond Its Own State.** Though foreign corporations are discriminated against, a domestic corporation does not become taxable merely because it extends its field of usefulness beyond the borders of its home state. The various states have no policy which obliges their charitable institutions under penalty of taxation to limit their field of usefulness to the state of their origin. The mere fact that a corporation disburses charity beyond state limits is, therefore, no reason to tax it.[19] Certainly, the fact that it is expressly authorized to use its resources beyond the state limits, does not make it taxable where it actually confines its operation within the state.[20]

§ 784. **Inheritance Tax. "Now Exempt."** It will not be necessary that all the property of a charity be exempt.[21] "If the meaning of the statute is that the exemption only applies when the association, falling within the terms of the statute in other respects, holds all its property free from yearly taxation, practically the exemption, which was intended to foster and encourage such institutions, would be found to apply to a rather peculiar and limited class."[1] A gift of a parsonage to a religious society will, therefore, be exempt, though the parsonage itself will be subject to taxation in its hands.[2] The exemption clause need not be con-

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[17] 1911, In re Lyon, 128 N. Y. Supp. 1004.

[18] 1906, In re Rothchild, 71 N. J. Eq. 210, 63 Atl. 615 (Affirmed 72 N. J. Eq. 425, 65 Atl. 1118).

[19] 1899, Balch v. Attorney General, 174 Mass. 144, 54 N. E. 490.

[20] 1911, Carter v. Story, 76 N. H. 34, 78 Atl. 1072.

[21] 1891, In re Vassar, 127 N. Y. 1, 27 N. E. 394.

[1] 1908, Carter v. Whitcomb, 74 N. H. 482, 485, 69 Atl. 779, 17 L. R. A. (N. S.) 733.

[2] 1904, First Universalist Soc. v. Bradford, 185 Mass. 310, 70 N. E. 204.

tained in the charter of the institution. A general statutory provision is sufficient.[3]

§ 785. **Inheritance Tax. General Provisions. Foreign Corporations.** A number of states, instead of referring to the exemption from general taxation as the criterion, have created definitions of their own. These provisions have not been construed with uniformity. While foreign corporations are clearly not exempt, though they do part of their work in the state where the statute covers only "institutions in this state for purely public charity,"[4] the situation is not so clear where the words "in this state" are not used, and this has led to a conflict in the authorities. In a number of cases, courts have, under such general provisions, limited the exemption to charities over which they have control,[5] though the decision in some of these cases was not unanimous. The Louisiana[6] and California[7] courts have reached a contrary conclusion. In view of the principles of liberal construction applicable to this branch of the subject,[8] there can be no doubt but that the latter holdings are correct in principle. It has, therefore, been held by the Iowa court that where charitable "societies or institutions" are exempted from the inheritance tax, a gift to a foreign corporation to be exclusively expended within the state is exempt.[9]

§ 786. **Inheritance Tax. Property in the Hands of Trustees.** The legislature certainly may exempt property given to trustees for charitable purposes.[10] There must, however, be some express statute to accomplish this result. Where merely "societies, incorporations and institutions" are ex-

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[3] 1887, In re Miller, 5 Dem. Sur. 132 (N. Y.).

[4] 1904, Humphreys v. State, 70 Ohio St. 67, 77, 70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888, 1 Ann. Cas. 233.

[5] 1922, People v. Woman's Home Missionary Society, 303 Ill. 418, 135 N. E. 749; 1877, People v. Western Seaman's Friend Society, 87 Ill. 246; 1916, Price v. Edwards, 88 N. J. Law 582, 97 Atl. 57; 1900, Alfred University v. Hancock, 69 N. J. Eq. 470, 46 Atl. 178; 1906, In re Rothchild, 71 N. J. Eq. 210, 63 Atl. 615 (Affirmed 72 N. J. Eq. 425, 65 Atl. 1118); 1914, In re Quirck, 257 Mo. 422, 165 S. W. 1062.

[6] 1917, In re Frain, 141 La. 932, 75 So. 847.

[7] 1918, In re Fisk, 178 Cal. 116, 172 Pac. 390.

[8] See ante Sections 775 to 777.

[9] 1910, In re Crawford, 148 Iowa 60, 126 N. W. 774, 23 Ann. Cas. 992.

[10] 1911, Davis v. Treasurer, 208 Mass. 343, 94 N. E. 556.

empt, a gift to trustees will be taxable.[11] A mere fund entrusted to a trust company will not be considered as an institution so as to be exempt.[12] The mere fact that the trustees determine to incorporate will not save the gift from the inheritance tax where it has actually vested in them.[13]

§ 787. **Inheritance Tax. Charitable Institution.** Where the statute exempts all charitable institutions or societies, the rule of construction is simple enough. To determine whether an institution is charitable, resort must be had to the accepted doctrine respecting charitable uses.[14] Accordingly, the Rockefeller Foundation,[15] the World's Peace Foundation,[16] a fountain for horses,[17] a gift to a county for its poor,[18] a donation to provide fuel for poor persons in the winter,[19] an institution to provide a central home for charitable Hebrew societies,[20] and even a Masonic hall and asylum fund[21] have been held to be exempt. That incidental provision is made for such productive use of the labor of the beneficiaries as will serve to bear a part of the expense of the institution,[1] or that an entrance fee is required,[2] though this consists of all the property which the beneficiary possesses,[3] is immaterial. That the benefits are confined to Civil War veterans

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[11] 1901, Knight v. Stevens, 72 N. Y. Supp. 815, 66 App. Div. 267 (Reversed 171 N. Y. 40, 63 N. E. 787); 1913, In re Robinson, 142 N. Y. Supp. 456, 80 Misc. 458 (Affirmed 145 N. Y. Supp. 1143). But see 1915, Curtis' Estate, 88 Vt. 445, 452, 92 Atl. 965.

[12] 1900, Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361.

[13] 1910, Pierce v. Stevens, 205 Mass. 219, 91 N. E. 319.

[14] 1904, In re Vineland Historical and Antiquarian Society, 66 N. J. Eq. 291, 295, 56 Atl. 1039.

[15] 1917, In re Rockefeller, 165 N. Y. Supp. 154, 177 App. Div. 786 (Affirmed 232 N. Y. 563, 119 N. E. 1074).

[16] 1917, Parkhurst v. Treasurer, 228 Mass. 196, 117 N. E. 39.

[17] 1909, In re Graves, 242 Ill. 23, 89 N. E. 672, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302.

[18] 1910, In re Spangler, 148 Iowa 333, 336, 127 N. W. 625.

[19] 1922, In re Maynes Estate, 118 Wash. 644, 204 Pac. 596.

[20] 1915, In re Loeb, 152 N. Y. Supp. 879, 167 App. Div. 588.

[21] 1912, In re Allen, 136 N. Y. Supp. 327, 76 Misc. 88. The Iowa court has decided that the charity need not be catholic and universal, reaching out to all persons, but may be confined to expend its resources sympathetically to relieve the distress which is hard by and whose cry is more readily heard, because it is within the fraternal circle. 1910, Morrow v. Smith, 145 Iowa 514, 124 N. W. 316, Ann. Cas. 1912, A. 1183.

[1] 1910, In re Moore, 122 N. Y. Supp. 828, 66 Misc. 116 (Affirmed 128 N. Y. Supp. 1135, 143 App. Div. 973).

[2] 1891, In re Vassar, 127 N. Y. 1, 27 N. E. 394.

[3] 1908, Carter v. Whitcomb, 74 N. H. 482, 488, 69 Atl. 779, 17 L. R. A. (N. S.) 733.

and their families, is no objection.[4] Where, however, power is given to bestow a gift either on the poor, those who have served France, or have been of exemplary conduct, the gift is not a charity and hence is not exempt.[5] Similarly, a gift to a vivisection investigation league,[6] or to a society for the prevention of cruelty to animals,[7] does not create a charity.

§ 788. **Inheritance Tax. Educational Institutions.** In statutes exempting educational institutions, the word "educational" is used in its broader signification as the art of developing, cultivating, and maturing the physical, intellectual and moral faculties, and thus improve the body, the mind, and the heart.[8] Accordingly, a gift to a city for a trades school under the direction of its board of education,[9] and to a women's Christian temperance union,[10] has been held to be exempt. A different conclusion has been reached in regard to a library corporation[11] and an historical society.[12] The latter, though it collected material of historical value, has been held to be rather a museum than an educational institution. On the other hand, the New York court has held that the Metropolitan Museum of Art is an educational corporation, though it has no regular corps of teachers with regular classes of students. The court states that appliances and restrictions essential to the stimulation to study of youthful and immature persons are not necessary, where the aim is to supply education in the higher branches to more mature students.[13]

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[4] 1908, Carter v. Whitcomb, supra.

[5] 1917, Succession of Ribet, 141 La. 572, 75 So. 414.

[6] 1916, In re Howard, 157 N. Y. Supp. 1114, 94 Misc. 560.

[7] 1913, In re Daly, 141 N. Y. Supp. 199, 79 Misc. 586 (Affirmed 148 N. Y. Supp. 1111); 1889, In re Keith, 5 N. Y. Supp. 201, 1 Con. Sur. 370, 22 N. Y. St. Rep. 337.

[8] 1910, In re Moses, 123 N. Y. Supp. 443, 446, 138 App. Div. 525.

[9] 1912, In re Saunders, 137 N. Y. Supp. 438, 77 Misc. 54.

[10] 1911, In re Field, 130 N. Y. Supp. 195, 71 Misc. 396 (Affirmed 131 N. Y. Supp. 1114).

[11] 1907, In re Francis, 105 N. Y. Supp. 643, 121 App. Div. 129 (Affirmed 189 N. Y. 554, 82 N. E. 1126); 1870, Providence Athenaeum v. Tripp, 9 R. I. 559.

[12] 1904, In re Vineland Historical and Antiquarian Society, 66 N. J. Eq. 291, 56 Atl. 1039.

[13] 1909, In re Mergemtine, 113 N. Y. Supp. 948, 951, 129 App. Div. 367 (affirmed 195 N. Y. 572, 88 N. E. 1125). See also 1911, In re Arnot, 130 N. Y. Supp. 197, 71 Misc. 390 (Affirmed 130 N. Y. Supp. 499, 145 App. Div. 708). But see 1891, In re Wolfe, 15 N. Y. Supp. 539, 2 Con. Sur. 600, 21 N. Y. Supp. 515, 522, 66 Hun. 389, 29 Abb. N. C. 340 (Reversed 137 N. Y. 205, 33 N. E. 156, 29 Abb. N. C. 451); 1890, In re Neale, 10 N. Y. Supp. 713, 57 Hun. 591, 32 N. Y. St. Rep. 910.

§ 789. **Inheritance Tax. Religious Purposes.** The third great class of charities covers religious institutions. Gifts to the Salvation Army[14] and to a Roman Catholic church for masses,[15] have, therefore, been exempted. A gift to sustain good music in a church and to defray its general expenses has also been sustained.[16] A corporation of a religious character, however, will not be exempted where it is incorporated under the general, instead of under the religious, corporation statute.[17]

§ 790. **Summary. Statutes. Construction.** Exemption statutes are generally construed strictly because they are an extraordinary grace of the sovereign power which increases the burden of taxation imposed on other property. Where, however, the exemption is of a charity, the authorities generally construe the statute liberally on the ground that charitable institutions relieve the state of many burdens. Thus, special charters, creating charitable corporations and exempting them from taxation, have been construed into contracts which the state cannot breach. An exemption of "purely public charities," by the weight of authority, exempts all institutions which can bring themselves within the legal definition of a charity.

§ 791. **Summary. Commercial Uses.** Under statutes exempting property used, or occupied, or exclusively used or occupied for charitable purposes, real estate of a charity let for commercial profit is taxable, though such profit is devoted to charitable purposes. The same is true where a private owner leases his property to a charitable institution which uses it exclusively for charitable purposes. However, the fact that the property of a charitable institution is incidentally used for commercial purposes, or is widely separated, or that its employees receive salaries or that its beneficiaries perform work or make payments, or are given opportunities for recreation, is immaterial.

§ 792. **Summary. Apportionment. Intermittent Use.**

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[14] 1910, In re Crawford, 148 Iowa 60, 126 N. W. 774, 23 Ann. Cas. 992.

[15] 1907, In re Didion, 105 N. Y. Supp. 924, 54 Misc. 201.

[16] 1910, Carter v. Eaton, 75 N. H. 560, 78 Atl. 643. Followed 1911, Carter v. Story, 76 N. H. 34, 78 Atl. 1072.

[17] 1907, In re White, 103 N. Y. Supp. 688, 118 App. Div. 869.

Endowment Funds. Where a building owned by a charitable institution is in part used for commercial purposes, courts have gone to both extremes, either exempting or taxing the entire property. The weight of authority and the better reasoning, however, divides the property into taxable and exempt portions, according to the nature of the use to which these portions are subjected. While wild and unimproved land or vacant city lots, and even land on which there is a burned, or temporary, or disused building, or an edifice in course of construction, are generally taxable, though the owner is a charitable institution, the mere fact that its property is used only intermittently will not spell taxation for it. Endowment funds of charitable institutions are generally exempted when they are invested in income producing securities, but taxable when they are invested in real estate.

§ 793. **Summary. Publishing House. Teacher's Residence. Roomers.** A publishing company or book store, conducted by a religious denomination, is taxable where the main purpose is profit, but exempt where the main purpose is the spreading of the gospel. Where the residence of a teacher in the property of a school is the main feature, the property is taxable, but where the main purpose of such residence is to better conduct the institution, it is exempt. In the case of roomers or boarders in an institution, exemption will be granted where the main purpose is their spiritual, mental and physical improvement.

§ 794. **Summary. Cemeteries. Secret Societies. Foreign Corporations.** Cemeteries in actual use, though but a few graves have as yet been dug, present a strong case for exemption. A tax sale of graves, or of land near graves, is repulsive. Accordingly, cemeteries and chapels connected with them have been universally exempted. The mere fact that lots on a cemetery are sold instead of being given away does not make any difference. Personal property of cemetery associations, however, is not exempt, as a sale of it will not disturb any graves. Whether secret societies are charities so as to be exempt from taxation has divided the courts. Of course, where such a society is merely a mutual insurance company, it is taxable. In regard to foreign corporations, the overwhelming weight of authority favors a construction

taxing their property, though the statutory language exempts all property "exempted by law."

§ 795. **Summary. Inheritance Taxes.** The provisions of statutes dealing with inheritance taxation will be liberally construed in favor of charitable donees, on the ground that no impediment should be placed in the way of persons who desire to relieve the government of a part of its burden. There must, however, be some statutory provision for their exemption from taxation, not a mere absence of such a provision.

CHAPTER XIX

DAMAGE LIABILITY

§ 798. **English Cases.** The question of the liability of charitable institutions to actions for damages presents great difficulties, and, hence, has peculiarly engaged the attention of the bench and bar of the country. "The problem has been scrutinized from every conceivable viewpoint. The arguments for and against have well-nigh been exhausted, and little, if anything, new remains to be advanced."[1] In their opinions the courts have frequently gone back to certain English cases disregarding the points decided, but stressing certain **dicta** which have been uttered by the judges which decided them. It is curious to note that none of these cases were really in point. **Dunkan v. Findlader,** decided in 1839, involved a claim against the treasurer of a turnpike road which seems to have been a public corporation.[2] In **Mercy Docks v. Gibbs,** decided in 1864, the defendant was a corporation which provided docking facilities and the plaintiff claimed that a cargo of guano had come to grief on account of defendant's negligence.[3] **Herriots' Hospital v. Ross,** decided in 1846, involved a claim for damages on the part of an applicant for rejection from the benefit of the charity.[4] Though these and other English cases[5] on their very face did not involve the question in which we are interested, they have, nevertheless, been drawn on extensively and made to support propositions which would have astonished the judges who wrote the opinions. It would waste valuable space to no useful purpose to attempt to trace the use which has been made of these cases by American courts. They will, therefore, be passed by hereafter without any further reference.

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[1] 1918, Magnuson v. Swedish Hospital, 99 Wash. 399, 407, 169 Pac. 828.

[2] 6 Clark & F. 894, 2 Macl. & Rob. 911.

[3] L. R., 1 Engl. and Irish App. 93 (affirmed, 11 H. L. Cas. 689).

[4] 12 Clark & F. 507.

[5] See 1901, Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; 1879, Glavin v. Rhode Island Hospital, 12 R. I. 411, 423, 426, 427, 34 Am. Rep. 675.

§ 799. **Public Corporations.** The question of exemption from tort liability has frequently come up in connection with municipal corporations such as counties, cities, towns, villages, and school districts. In such cases it is recognized that individual advantage must give way to the public welfare, and that individual grievances must not override the public good, nor make the public funds the primary source of individual compensation.[6] Clearly, therefore, the reasons for the limited liability of municipal bodies for the torts of their servants have no application to charitable corporations.[7] A municipality, in performing charitable functions, is acting as an agency of the sovereign and, therefore, enjoys the sovereign's immunity from suit.[8] "In providing for the care of the poor, a police power which resides primarily in the sovereignty is exercised, and neither the sovereign nor the local governing body to whom such a power is delegated, is responsible for the misfeasance of its officers."[9] A municipality is not especially benefited by such work, but is performing a service essential for the welfare of the public in preserving the peace, preventing the destruction of property, or performing any other kindred obligation, and public policy demands that it be given immunity from liability for the negligence of those who actually perform the duty.[10] It has, therefore, been said that a county is not responsible for the acts of officers or employees which it appoints in the exercise of the sovereign power of the state, by the requirement of a public law, and simply for the public benefit, and for a purpose from which it, as a corporation, derives no benefit.[11] "Where care and diligence are used in the selection of a physician, the officers representing the county have done their duty, and where there is no breach of duty there

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[6] 1888, Ford v. Kendall Borough School District, 121 Pa. 543, 549, 15 Atl. 812, 1 L. R. A. 607.

[7] 1906, Hewett v. Woman's Hospital Ass'n, 73 N. H. 556, 565, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

[8] 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372 (Affirming 101 Fed. 896).

[9] 1885, Summers v. Daviess County, 103 Ind. 262, 264, 265, 2 N. E. 725, 53 Am. Rep. 512.

[10] 1906, Noble v. Hahnemann Hospital, 98 N. Y. Supp. 605, 607, 112 App. Div. 663, 18 N. Y. Ann. Cas. 365.

[11] 1862, Sherbourne v. Yuba, 21 Cal. 113, 81 Am. Dec. 151.

can be no negligence."[12] The same holds good in regard to school districts,[13] boards of school commissioners,[14] boards of education,[15] towns,[16] poor districts,[17] and cities.[18] It does not stop here, however, but extends to other agencies and sub-agencies by which the work of the state is carried on. "If a municipal corporation which has a twofold character, one public and the other private, is exempt from liability for the negligence of its agents when in the exercise and performance of its powers and duties as an agency of the government, a public corporation, which was created and exists for no other than governmental purposes, must necessarily be exempt from such liability."[19] On this ground federal soldiers' homes,[20] state insane asylums,[21] industrial schools,[1] houses of refuge,[2] and city hospitals[3] have been exempted from liability. It has even been held that this exemption extends to a hospital where a city has entrusted its ambulance service to it.[4] Of course, the mere fact that a city is the trustee of a charity, does not exempt the charity

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[12] 1885, Summers v. Daviess County, 103 Ind. 262, 263, 2 N. E. 725, 53 Am. Rep. 512.

[13] 1888, Ford v. Kendall Borough School District, 121 Pa. 543, 549, 15 Atl. 812, 1 L. R. A. 607.

[14] 1902, Weddle v. Frederick County, 94 Md. 334, 51 Atl. 289.

[15] 1876, Finch v. Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414.

[16] 1875, Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; 1860, Biglow v. Randolph, 80 Mass. (14 Gray) 541.

[17] 1902, Peasley v. McKean County Poor District, 26 Pa. Co. Ct. Rep. 428.

[18] 1872, Ogg v. Lansing, 35 Iowa 495, 499, 14 Am. Rep. 409; 1875, Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468 (Affirming 2 Hun. 263, 4 Thomp. & C. 491).

[19] 1899, Mala v. Eastern State Hospital, 97 Va. 507, 511, 47 L. R. A. 577, 34 S. E. 617.

[20] 1903, Overholser v. National Home for Disabled Volunteer Soldiers, 68 Ohio St. 236, 247, 67 N. E. 487, 62 L. R. A. 936, 96 Am. St. Rep. 658; 1909, Lyle v. National Home, 170 Fed. 842.

[21] 1903, White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454; 1906, Leavell v. Western Kentucky Asylum, 122 Ky. 213, 91 S. W. 671, 28 Ky. Law Rep. 1129, 4 L. R. A. (N. S.) 269.

[1] 1894, Williamson v. Louisville Industrial School, 95 Ky. 251, 24 S. W. 1065, 44 Am. St. Rep. 243, 23 L. R. A. 200; 1903, Corbett v. St. Vincent's Industrial School, 177 N. Y. 16, 68 N. E. 997 (Affirming 79 N. Y. Supp. 369, 79 App. Div. 334).

[2] 1885, Perry v. House of Refuge, 63 Md. 20, 28, 52 Am. Rep. 495, 1923, Wallwork v. Nashville, 147 Tenn. 681, 251 S. W. 775.

[3] 1869, Murtaugh v. St. Louis, 44 Mo. 479; 1867, Richmond v. Long, 58 Va. (17 Gratt.) 375, 94 Am. Dec. 461.

[4] 1906, Noble v. Hahnemann Hospital, 98 N. Y. Supp. 605, 112 App. Div. 663, 18 N. Y. Ann. Cas. 365.

from liability.[5] All these and similar cases, while they may present valuable analogies, are not germane to the subject under investigation and are, therefore, disregarded in the following pages.

§ 800. **Non-Charitable Bodies.** While governmental agencies, though they perform charitable functions, must be eliminated from the discussion, non-charitable organizations in the technical sense of the word, though they may do much good in their several ways, cannot be accorded any more considerate treatment. On the ground that they are not charities, cemeteries,[6] medical colleges,[7] protective departments,[8] or fire insurance patrols,[9] private sanitariums,[10] commercial hospitals,[11] mutual benefit societies,[12] agricultural societies,[13] state fair associations,[14] and even Young Men's Christian Associations[15] have been denied exemption. Similarly, a corporation founded for charitable purposes from which it has departed, or a lay corporation which administers

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[5] 1902, Winnemore v. Philadelphia, 18 Pa. Super. Ct. 625.

[6] 1912, East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N. E. 1036, 1037; 1888, Donnelly v. Boston Catholic Cemetery Ass'n, 146 Mass. 163, 15 N. E. 505.

[7] 1907, Medical College v. Rushing, 1 Ga. App. 468, 473, 57 S. E. 1083.

[8] 1890, Newcomb v. Boston Protective Department, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; 1900, Bates v. Worcester Protective Department, 177 Mass. 130, 58 N. E. 274.

[9] 1909, Coleman v. Fire Insurance Patrol, 122 La. Ann. 626, 48 So. 130, 21 L. R. A. (N. S.) 810; 1910, Rady v. Fire Insurance Patrol of New Orleans, 126 La. 273, 52 So. 491, 139 Am. St. Rep. 511; 1886, Boyd v. Insurance Patrol of Philadelphia, 113 Pa. 269, 6 Atl. 536 s. c. 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; 1915, Sutter v. Milwaukee Board of Fire Underwriters, 161 Wis. 615, 618, 155 N. W. 127, Ann. Cas. 1917, E. 682.

[10] 1902, Galesburg Sanitarium v. Jacobson, 103 Ill. App. 26; 1914, Green v. Biggs, 167 N. C. 417, 421, 83 S. E. 553; 1906, Stanley v. Schumpert, 117 La. 255, 41 So. 565, 6 L. R. A. (N. S.) 306, 116 Am. St. Rep. 202; 1921, Barnes v. Providence Sanitarium, —— Tex. Civ. App. ——, 229 S. W. 588.

[11] 1907, Gitzhoffen v. Holy Cross Hospital Ass'n, 32 Utah 46, 88 Pac. 691, 8 L. R. A. (N. S.) 1161; 1907, University of Louisville v. Hammock, 127 Ky. 564, 32 Ky. Law Rep. 431, 106 S. W. 219; 1921, Malcolm v. Ev. Luth. Hospital Ass'n, 107 Neb. 101, 185 N. W. 330.

[12] 1903, Brown v. La Societe Francaise, 138 Cal. 475, 477, 71 Pac. 516.

[13] 1909, Logan v. Agricultural Society, 156 Mich. 537, 541, 121 N. W. 485.

[14] 1918, Tri State Fair v. Rowton, 140 Tenn. 304, 204 S. W. 761, L. R. A. 1918, F. 657.

[15] 1896, Chapin v. Holyoke Y. M. C. A., 165 Mass. 280, 42 N. E. 1130; 1918, Susman v. Y. M. C. A., 101 Wash. 487, 172 Pac. 554.

some charity is not a charitable corporation.[16] With such and similar cases we are, therefore, not concerned. The exemptions of charities only in the strict and technical sense of the term is the subject of this chapter.

§ 801. **Contracts.** The elimination of governmental agencies and non-charitable ventures still leaves certain other situations to be eliminated. Charities will be held to a fulfillment of their contracts just like any other person or corporation. While on ordinary principles they will not be liable on a contract made by one of their agents without authority,[17] an action of assumpsit for a breach of a contract to furnish certain accommodations is maintainable against them.[18] A patient may, therefore, recover from a hospital for the breach of a contract to furnish a competent nurse[19] or to take care of a sick child.[20] Ordinarily, however, cases of breach of contract by charitable institutions resulting in damages are treated as sounding in tort in analogy "to the rule applied to common carriers in suits by their passengers who sustain contractual relations the one with the other, although the suit is generally treated as one sounding in tort."[21] It has, therefore, been stated that there can be no liability in contract if none exists in tort.[1] Some cases, however, bring the liability, even where there is an express contract, down to the mere requirement of using due care in the selection of agents. Thus, the Kansas court has held that, where the agents were selected with due care, a charitable hospital, which has contracted to be specially careful in treating a melancholic patient, is not liable for injury resulting from failure constantly to watch the patient.[2]

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[16] 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 204 App. Div. 664.

[17] 1904, Wilson v. Brooklyn Homoeopathic Hospital, 89 N. Y. Supp. 619, 97 App. Div. 37.

[18] 1912, Armstrong v. Wesley Hospital, 170 Ill. App. 81.

[19] 1899, Ward v. St. Vincent's Hospital, 57 N. Y. Supp. 784, 39 App. Div. 624 (See also s. c. 79 N. Y. Supp. 1004, 78 App. Div. 317).

[20] 1916, Roche v. St. John's Riverside Hospital, 160 N. Y. Supp. 401, 96 Misc. 289 (Affirmed 161 N. Y. Supp. 1143). But see 1919, Boston Safe Deposit and Trust Co. v. Attorney General, 234 Mass. 261, 125 N. E. 392.

[21] 1918, Cook v. John C. Norton Memorial Infirmary, 180 Ky. 331, 333, 202 S. W. 874.

[1] 1920, Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392.

[2] 1918, Davin v. Kansas Medical Missionary Ass'n, 103 Kans. 48, 172 Pac. 1002. See 1876, McDonald v. Massachusetts General Hospital, 120 Mass. 432, 436, 21 Am. Rep. 529.

§ 802. **Property Used for Profit.** Another situation which must be eliminated has reference to injuries occurring in connection with business blocks or other property in which the funds of a charity are invested. It goes without saying that such property is used by tenants and the public in exactly the same manner as if it belonged to an individual or a corporation for profit. An exemption extended to it might well be disastrous to the charity. It might not be able to find tenants and would, therefore, be inconvenienced rather than benefited by its investment. It has, therefore, been held that where a charitable institution lets a part of its building to a tenant for purposes entirely disconnected with charity, an employee of the institution may recover for injuries suffered while helping to carry out the contract between the charity and the tenant.[3] The negligent act of an elevator operator in such a building has been held to be an incident to the management of the property chargeable as among the items of cost.[4] A hospital, which conducts a garment factory, has been held responsible for an injury to one of its working girls.[5]

§ 803. **Nuisance.** There is still another subject as to which charities will not be allowed to escape liability. They may not create a nuisance on their property and after a person has been injured plead their charitable character as a defense. "If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts."[6] Therefore, a university has been held not to be liable for the acts of its agents in setting gopher guns on its campus through which the plaintiff was injured. Though the preservation of its

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[3] 1911, Holder v. Massachusetts Horticultural Society, 211 Mass. 370, 97 N. E. 630.

[4] 1902, Winnemore v. Philadelphia, 18 Pa. Super. Ct. 625, 630.

[5] 1919, Hotel Dieu v. Armendarez, 210 S. W. 518 (Affirming 167 S. W. 181) (Tex.).

[6] 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 304, 47 C. C. A. 122, 65 L. R. A. 372. See also cases cited in 1906, Leavell v. Western Kentucky Asylum, 122 Ky. 213, 217, 91 S. W. 671; 28 Ky. Law Rep. 1129, 4 L. R. A. (N. S.) 269.

grounds are desirable, it is not organized to engage in landscape gardening.[7] A college is not responsible for the acts of its students or professors in stretching a wire across the grounds during a baseball game and leaving it there after the game to the injury of the plaintiff.[8] Similarly, a charitable institution is liable for false imprisonment.[9] Therefore, a charitable corporation which drains its sewage into a well which the owner uses for medicinal purposes will not only be enjoined, but subjected to the payment of damages.[10] Says the Michigan court: "Corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot, therefore, claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such a tort."[11]

§ 804. **Trust Fund Theory.** The elimination of governmental and non-charitable agencies and of contract liability, nuisance and the like leaves the question of the liability of charities for personal injuries to beneficiaries, employees, invitees, and strangers as the proper subject of this chapter. It is not astonishing, in view of the high favor with which charities are regarded by the courts, that there are jurisdictions which have gone to extremes in exempting charitable ventures from all claims for damages, whether they have occurred to strangers or patients, whether they are the result of the negligence of attendants, or the negligence of trustees or managers in selecting them. Where this doctrine of universal exemption obtains, it is based on the proposition that the funds of the corporation are the subject of a trust, and that to suffer a judgment to be rendered against the corporation, and to subject its property to the judgment would be an illegal diversion of trust estate.[12] The Illinois court,

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[7] 1912, Hill v. Tualatin Academy, 61 Ore. 190, 198, 121 Pac. 901.

[8] 1914, Corley v. American Baptist Home Mission Society, 97 S. C. 460, 81 S. E. 146.

[9] 1909, Gallon v. House of Good Shepard, 158 Mich. 361, 367, 122 N. W. 631, 133 Am. St. Rep. 387.

[10] 1922, Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550, 243 S. W. 304.

[11] 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 255, 110 N. W. 951, 10 L. R. A. (N. S.) 74.

[12] 1910, Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626.

therefore, says that an institution "doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent act of those employed to carry the beneficent purpose into execution."[13] In Maine it has been argued that unless charitable institutions are exempted "private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness."[14] The Pennsylvania court has worked itself into a frenzy, exclaiming: "How much better than a thief would be the law itself, were it to apply the trust's funds contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee."[15] The South Carolina court has concluded: "The exemption of public charities from liability in actions for damages for tort rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbid the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or more individual members of the public for injuries inflicted by the negligence of the corporation itself, or of its superior officers or agents, or of its servants or employees. The principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than

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[13] 1905, Parks v. Northwestern University, 218 Ill. 381, 385, 75 N. E. 991, 2 L. R. A. (N. S.) 556 (Affirming 121 Ill. App. 512).

[14] 1910, Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 411, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

[15] 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 649, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

for the public to be deprived of the benefit of the charity."[16] Similar views have been expressed in Maryland,[17] Kentucky,[18] Arkansas,[19] Missouri,[20] and Tennessee.[21] The Massachusetts court has said that "if the property of the charity was depleted by the payment of damages, its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charitable gifts discouraged."[22] Hence, this court has concluded that charities cannot be guilty of negligence and that hence the death statute can have no application to them.[1] Accordingly, the Missouri court has held that a full pay patient who has received a carbolic acid rub instead of an alcohol massage is without a remedy against the hospital.[2] It follows that a person injured at a musical entertainment given in the new auditorium of an educational charity, by the falling of a balcony, an admission fee being charged, is not entitled to recover from the institution.[3] No lengthy criticism of this rule will be attempted. Those who favor it are entitled to their preferences. The author prefers to agree with the opinion of the New Hampshire court that it is completely barren of argument in its favor.[4] The will of an individual, charitable

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[16] 1916, Vermillion v. Woman's College of Due West, 104 S. C. 197, 200, 201, 88 S. E. 649.

[17] 1885, Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; 1917, Loeffler v. Sheppard and Enroch Pratt Hospital, 130 Md. 265, 100 Atl. 301, L. R. A. 1917, D. 967.

[18] 1894, Williamson v. Louisville Industrial School, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, 24 Am. St. Rep. 243; 1907, University of Louisville v. Hammock, 127 Ky. 564, 570, 106 S. W. 219, 32 Ky. Law Rep. 431.

[19] 1905, Woman's Christian National Library Ass'n v. Fordyce, 79 Ark. 532, 541, 86 S. W. 417; 1911, Morris v. Nowlin Lumber Co., 100 Ark. 253, 268, 140 S. W. 1.

[20] 1907, Adams v. University Hospital, 122 Mo. App. 675, 679, 99 S. W. 453; 1909, Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 117 S. W. 1189.

[21] 1907, Alston v. Waldon Academy, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179.

[22] 1906, Farrigan v. Pevear, 193 Mass. 147, 149, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484. See the discussion of the Massachusetts situation in 1910, Horden v. Salvation Army, 199 N. Y. 233, 236, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62.

[1] 1920, Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392.

[2] 1920, Nicholas v. Evangelical Deaconess Home and Hospital, 281 Mo. 182, 219 S. W. 643, 646.

[3] 1916, Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649.

[4] 1906, Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 564, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

though it may be, should not be allowed to exempt property from the operation of the general laws of the land.[5] If natural persons must be just before they are generous, charities certainly should not be allowed to perpetrate injustice to some in order to bestow charity on others. If public policy demands such a rule, the legislature, not the courts, should make the first move.

§ 805. **Negligence in Selecting Servants.** The great majority of the states, however, do not recognize any such absolute exemption, but make a distinction, not only between beneficiaries and other persons, but also between the negligence of subsidiary employees of a charity and that of its authorities in employing or retaining them.[6] The feeling which has led to the latter distinction has been well expressed in a federal case as follows: "It would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger."[7] Says the South Carolina court: "The beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skilled and humane treatment. If they are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established."[8] Though this distinction has been branded as a "compromise between two irreconcilable principles"[9] it is well established.[10] Where, therefore, a charitable hospital delegates the duty of placing hot bottles in beds to an incompetent and wholly inexperienced person employed to wash dishes and run errands, it is liable for injury thereby sustained by

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[5] 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 354, 110 N. W. 951, 10 L. R. A. (N. S.) 74.

[6] 1921, Butler v. Berry School, 27 Ga. App. 560, 109 S. E. 544; 1914, Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807, Ann. Cas. 1916, E. 250.

[7] 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 304, 47 C. C. A. 122, 65 L. R. A. 372.

[8] 1914, Hoke v. Glenn, 167 N. C. 594, 597, 83 S. E. 807, Ann. Cas. 1916, E. 250.

[9] 1906, Fordyce v. Woman's Christian National Library Ass'n, 79 Ark. 550, 557, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[10] 1917, Goodman v. Brooklyn Hebrew Orphan Asylum, 165 N.

the plaintiff on the ground that it did not exercise ordinary care in its selection of servants.[11] A charitable hospital is liable for the act of a servant chosen without due care in administering a clysis or enema of scalding hot water on the plaintiff.[12] A complaint by an injured patient alleging negligence in the selection of servants on the part of the hospital, which negligence caused the plaintiff's injury, has, therefore, been held not to be demurrable.[13]

§ 806. **Negligence of Subordinate Servant.** Negligence on the part of trustees and managers is naturally rare, and so are the cases which involve such negligence. Negligence, on the other hand, of servants is correspondingly frequent and has, therefore, been quite often investigated. The conclusion that a charity is not liable for such negligence is almost unanimous.[14] The drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant and not caused by its corporate negligence in the failure to perform a duty imposed on it by law.[15] "It would be a hard rule indeed—a rule calculated to repress the charitable instincts of men—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care."[16] The duty of trustees in the exercise of charitable functions does, therefore, not extend beyond the requirement of using reasonable care to select competent servants, and the demands of substantial justice are met if they are not charged with the negligence of those so employed.[17] Numerous cases

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Y. Supp. 949, 178 App. Div. 682. See also 1918, Magnuson v. Swedish Hospital, 99 Wash. 399, 169 Pac. 828.

[11] 1914, St. Paul's Sanitarium v. Williamson, 164 S. W. 36 (Tex. Civ. App.).

[12] 1922, Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N. E. 287.

[13] 1914, Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807, Ann. Cas. 1916, E. 250.

[14] 1916, Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 Pac. 385, Ann. Cas. 1918, E. 1172.

[15] 1895, Hearns v. Waterbury Hospital, 66 Conn. 98, 123, 33 Atl. 595, 31 L. R. A. 224.

[16] 1894, Union Pacific Railroad Co. v. Artist, 60 Fed. 365, 368, 9 C. C. A. 14, 19 U. S. App. 612, 23 L. R. A. 581. Followed 1895, Pierce v. Union Pacific R. Co., 66 Fed. 44, 13 C. C. A. 323, 32 U. S. App. 48.

[17] 1906, Farrigan v. Pevear, 193 Mass. 147, 151, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484.

illustrating this proposition could well be cited.[18] Nor will the mere fact that the plaintiff was a pay patient,[19] a scholar who pays tuition,[20] or that he disclaims any right of execution except against the fund derived from pay patients,[21] ordinarily make any difference. It is not usual or desirable that the ministrations of a charitable hospital should be confined exclusively to the poor or indigent. Those of moderate means, and not a few rich people, resort to such hospitals for treatment especially in surgical cases. From patients not indigent, a payment is commonly permitted or required. But the degree of care in all cases should be the same. Certain luxuries may be given to those who pay for them, but no greater care should be given to the rich person than to the pauper.[1] The same principle applies where the beneficiary performs work instead of making payments. Therefore, an industrial home which provides discharged prisoners with a temporary home and employment, actually paying them a small wage over and above their keep, is not responsible for

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[18] 1905, Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556 (Affirming 121 Ill. App. 512); 1876, McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; 1909, Thornton v. Franklin Square House, 200 Mass. 465, 467, 86 N. E. 909, 22 L. R. A. (N. S.) 486; 1891, Van Tassel v. Manhattan Eye and Ear Hospital, 60 Hun. 585, 15 N. Y. Supp. 620, 39 N. Y. St. Rep. 781; 1893, Haas v. Missionary Society, 26 N. Y. Supp. 868, 6 Misc. Rep. 281; 1895, Joel v. Woman's Hospital, 35 N. Y. Supp. 37, 2 N. Y. Ann. Cas. 264, 69 N. Y. St. Rep. 430; 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 236, 110 N. W. 951, 10 L. R. A. (N. S.) 74; 1909, Cunningham v. Sheltering Arms, 119 N. Y. Supp. 1033, 135 App. Div. 178 (Affirming 115 N. Y. Supp. 576, 61 Misc. Rep. 501); 1913, Wharton v. Warner, 75 Wash. 470, 135 Pac. 235.

[19] 1918, Mikota v. Sisters of Mercy, 183 Iowa 1378, 168 N. W. 219; 1920, Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392; 1894, Downes v. Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; 1920, Mulliner v. Evangelisher Diakonissenverein, 144 Minn. 392, 175 N. W. 699; 1920, Nicholas v. Evangelical Deaconness Home and Hospital, 281 Mo. 182, 219 S. W. 643; 1904, Wilson v. Brooklyn Homoeopathic Hospital, 89 N. Y. Supp. 619, 97 App. Div. 37; 1909, Cunningham v. Sheltering Arms, supra; 1900, Conner v. Sisters of the Poor, 10 Ohio S. & C. P. Dec. 86, 7 Ohio N. P. 514; 1921, Weston v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S. E. 785; 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372 (Affirming 101 Fed. 896).

[20] 1921, Butler v. Berry School, 27 Ga. App. 560, 109 S. E. 544.

[21] 1910, Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879.

[1] 1901, Powers v. Massachusetts Homoeopathic Hospital, supra.

an injury suffered by an inmate in a woodyard conducted as a part of its charitable work.[2] Nor will it make any difference that the institution is unincorporated,[3] or that the patient is committed to it instead of seeking it,[4] or that the negligence is very gross, such as operating on the right side for an inguinal hernia located on the left side,[5] or leaving a sponge in the body of the pay patient, thus causing her death,[6] or administering poison instead of medicine,[7] or rubbing a patient with carbolic acid instead of alcohol,[8] or failing constantly to attend a patient afflicted with a suicidal mania,[9] or placing a hot water bottle on the patient's feet while she is unconscious.[10]

§ 807. **Pay Patients.** Not all the states, however, have seen their way clear to exempt a charity from liability to a pay patient for the negligence of a nurse or physician. Such patients have, therefore, been allowed to recover in Rhode Island and Alabama for the negligence of an interne,[11] or a nurse[12] selected with due care by the hospital. Similarly, a charitable hospital in Georgia which accepted a patient for compensation and without her husband's consent performed an autopsy on her body "to gratify professional curiosity" has been held liable in damages for the mental suffering and injury caused to the patient's surviving spouse.[13] It is inter-

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[2] 1916, Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N. E. 606.

[3] 1906, Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484.

[4] 1915, Smith v. State, 154 N. Y. Supp. 1003, 169 App. Div. 438.

[5] 1901, Collins v. New York Post Graduate Medical School and Hospital, 69 N. Y. Supp. 106, 59 App. Div. 63. See 1902, Pepke v. Grace Hospital, 130 Mich. 493, 90 N. W. 278.

[6] 1911, Taylor v. Protestant Hospital Ass'n, 85 Ohio St. 90, 96 N. E. 1089.

[7] 1918, Paterlini v. Memorial Hospital Ass'n, 247 Fed. 639, 160 C. C. A. 49.

[8] 1920, Nicholas v. Evangelical Deaconess Home and Hospital, 281 Mo. 182, 219 S. W. 643, 646.

[9] 1912, Duncan v. Nebraska Sanitarium Benevolent Ass'n, 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913, E. 1127. See 1918, Davin v. Kansas Medical Missionary Ass'n, 103 Kans. 48, 172 Pac. 1002.

[10] 1923, Wallwork v. Nashville, 147 Tenn. 681, 251 S. W. 775.

[11] 1879, Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. For a criticism of the Rhode Island case see 1906, Fordyce v. Woman's Christian Library Ass'n, 79 Ark. 550, 558, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[12] 1915, Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4, L. R. A. 1915, D. 1167.

[13] 1907, Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1083.

esting to note, however, that the Rhode Island case was subsequently overruled by the legislature by providing that "no hospital incorporated by the general assembly of this state, sustained in whole or in part by charitable contributions or endowments, shall be liable for the neglect, carelessness, want of skill, or for the malicious acts of any of its officers, agents or employees in the management of, or for the care or treatment of, any of the patients or inmates of such hospital."[14]

§ 808. **Trust Theory Insufficient.** It will be next in order to pass in review the various grounds on which charities have been exempted from liability for the torts of their carefully chosen employees. The argument already noticed, that it is a diversion of a trust fund to permit such a liability, is clearly insufficient to explain the distinction between the negligence of trustees and managers and the negligence of servants and employees. It must be clear as day that a judgment given on either ground will equally divert the trust fund. "Certainly, liability for negligence in the selection of servants may impair the integrity of the trust estate, just the same as liability for the negligence of servants though, of course, not so frequently."[15] Followed to its logical conclusion, the trust theory must result in an absolute immunity from damages of any character.[16] "If the rule exists, it must necessarily apply to all torts and in all cases."[17] While the theory can, therefore, be used in supporting a total exemption of charities from tort liability, it will not serve to support the distinction above pointed out.

§ 809. **Respondeat Superior Rule.** Some courts have attempted to justify the rule by arguing that the rule of **respondeat superior** has no application to the situation. The Connecticut court has, therefore, stated that this rule is one of public policy to the effect that an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument such superior

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[14] General Laws Rhode Island, 1896, Page 538.

[15] 1910, Hordern v. Salvation Army, 199 N. Y. 233, 237, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62.

[16] 1915, Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 582, 68 So. 4, L. R. A. 1915, D. 1167.

[17] 1911, Kellogg v. Church Charity Foundation, 112 N. Y. Supp. 566, 569, 128 App. Div. 214.

has given the wrongdoer the opportunity to commit the injury; that a charity does not come within its reason as it derives no benefit from the acts of its servants and that, therefore, the rule has no application to it.[18] Similarly, the Massachusetts court has said that acting for the benefit of the public solely in representing a public interest does not involve such a private pecuniary interest as lies at the foundation of the doctrine of **respondeat superior.**[19] And the Wisconsin court has stated that "since charitable hospitals perform a quasi-public function in ministering to the poor and sick without any pecuniary profit to themselves, the doctrine of **respondeat superior** should not be applied to them in favor of those receiving their charitable services."[20] On this theory the Pennsylvania court has held that a hospital is not liable for the negligence of a nurse in giving poison as a cathartic.[21]

The trouble with this theory is that it proves too much. If a charity is not to be responsible on this ground for the negligence of its employees, it should not be held liable for the negligence of its officers and managers. If it is not to be liable to its patients, it should be exempt from liability as against strangers. There would, therefore, seem to be no distinction whether the servant carelessly injures one while in the hospital or in the street.[22] The trustees "could not, in case of a tort committed by one of their members, apply the funds in their hands to the payment of a judgment recovered therefor."[23] The Wisconsin court indeed has drawn this very conclusion. It has held a Y. W. C. A. which leased a room on the sixth floor of a building, and allowed a screen to fall from a window in such room on a passerby, to be exempt from liability.[24] That there are

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[18] 1895, Hearns v. Waterbury Hospital, 66 Conn. 98, 123-126, 33 Atl. 595, 31 L. R. A. 224.

[19] 1906, Farrigan v. Pevear, 193 Mass. 147, 150, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484.

[20] 1916, Morrison v. Henke, 165 Wis. 166, 170, 160 N. W. 173. See cases cited in 1908, Kellogg v. Church Charity Foundation, 112 N. Y. Supp. 566, 568, 128 App. Div. 214.

[21] 1918, Paterlini v. Memorial Hospital Ass'n, 247 Fed. 639, 160 C. C. A. 49.

[22] 1906, Noble v. Hahnemann Hospital, 98 N. Y. Supp. 605, 607, 112 App. Div. 663, 18 N. Y. Ann. Cas. 365.

[23] 1888, Fire Insurance Patrol v. Boyd, 120 Pa. 624, 647, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

[24] 1922, Bachman v. Y. W. C. A., 179 Wis. 178, 191 N. W. 751.

difficulties in the way of such a conclusion is clear. Says the New York supreme court: "We are unable to conceive of any good reason for a rule which differentiates in the case of a charitable institution between negligence of a servant or agent in carrying out details of work assigned to him, and negligence of an agent, though an officer of the corporation, in selecting the servant who causes the injury." In consequence, the court denied redress to an agricultural student of Cornell University whose eye was put out by the explosion of chemicals which he had procured from the stock room for experimental purposes.[25] A charity thus freed from legal restraint, instead of being a blessing, might very well become a curse. Instead of dispensing charity it would be inflicting injustice.

§ 810. **Waiver Theory.** Some courts have hit upon a waiver theory to explain the situation. It has been said that any citizen, who accepts the service of a charitable hospital, does so upon the implied assurance that he will assert no complaint which has for its object or for its result a total or partial destruction of the institution itself.[26] From this it is concluded that by accepting the benefit he, by implied contract, exempts his benefactor from liability for the negligence of the carefully chosen servants of the charity.[27] The objection to this theory is that it violates the facts. "A patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that the courts after years of travail have at last produced.[1] Certainly an employee of a railroad company, who fails to receive the emergency treatment called for in his case in the hospital of the company,

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[25] 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 377, 204 App. Div. 664.

[26] 1907, Adams v. University Hospital, 122 Mo. App. 675, 679, 680, 99 S. W. 453.

[27] 1914, Thomas v. German General Benevolent Society, 168 Cal. 183, 188, 141 Pac. 1186; 1918, Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 Pac. 1008; 1906, Farrigan v. Pevear, 193 Mass. 147, 149, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484; 1921, Barr v. Brooklyn Children's Aid Society, 190 N. Y. Supp. 296; 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 303, 304, 47 C. C. A. 122, 65 L. R. A. 372.

[1] 1914, Lindler v. Columbia Hospital, 98 S. C. 25, 36, 81 S. E. 512. The extract is from the dissenting opinion.

has not impliedly waived damages.[2] The theory breaks down any distinction between the negligence of a subordinate agent and the negligence of a superior agent in selecting an incompetent subordinate agent.[3]

§ 811. **Patient as Employer.** It will not be necessary to accept any of the above theories. There is a logical explanation based on facts which clarifies the situation. The doctrine of qualified immunity, where no negligence appears in the selection or retention of agents or servants, can properly and logically be based in most cases upon the theory that the physicians and surgeons in attendance upon patients in hospitals, or the nurses who are under their direction, are not the servants of the hospital in the true sense because as to the nature and manner of their service they are not under its direction, but that they become and remain the servants of the patient as long as they are in attendance upon him, and that, hence, the charity has performed its full duty when it has exercised due care in the selection of competent persons for such service.[4] Hence, the New York court has held that a hospital is not responsible for an unauthorized operation performed on a patient by the doctors and nurses connected with it.[5] A hospital in Maine has been absolved from blame for the death of a patient by falling out of a window where the patient occupied a private room, being placed there by her physician who retained full charge of her case and directed the nurses and house doctors who gave her such attention as her case called for.[6] Even the Rhode Island court, in holding a hospital liable for the negligence of a nurse, has expressly recognized that where the hospital does not agree to do more than furnish hospital accommodations, leaving the patient to find his own physician or surgeon, the hospital is plainly not liable for their torts on the ground

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[2] 1919, Fontanella v. New York Central Railroad Co., 174 N. Y. Supp. 537, 186 App. Div. 588 (Affirmed 228 N. Y. 546, 126 N. E. 907).

[3] 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 377, 204 App. Div. 664.

[4] 1912, Basabo v. Salvation Army, 35 R. I. 22, 28, 29, 85 Atl. 120, 42 L. R. A. (N. S.) 1109.

[5] 1914, Schloendorff v. New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915, C. 581.

[6] 1910, Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

that they are not its servants.[7] Says the Virginia court of a nurse who had injured a patient by a hot bottle: "Although employed by the hospital, she was at the time of the injury complained of in attendance upon the plaintiff's doctor, whose orders and directions she was expected to obey, rather than those of the hospital authorities."[8]

§ 812. **Employment Must Be Shown.** In order to recover, it will, therefore, be necessary to show that the relation of master and servant actually existed at the time of the injury. It follows that a hospital which keeps an ambulance at a livery stable, the owner of which furnishes the horse and driver, is not responsible for a collision caused by the negligence of such driver. It does not employ the driver, though it can bring such pressure to bear as would force the owner of the stable to discharge him.[9]

§ 813. **Distinction Well Established.** It has been seen that the distinction with which we have just been dealing is well established. It has also been seen that the mental process by which it has been reached is far from uniform. In fact, the cases on this subject present a hopelessly tangled mass of reason and unreason such as is not often encountered in the law. They show a marked difference in the process by which they reach results. This appears in the tests adopted to ascertain what is a corporate duty and a corporate neglect, in the confusion of the quasi trust imposed on each corporation with the relation of a strictly legal trustee to his trust fund and especially in the various means by which courts have sought to escape from the patent injustice of applying the extreme doctrine of **respondeat superior** to the personal defaults of the employees of charitable institutions.[10] The question is one on which the courts have been fertile in drawing subtle distinctions, many of them irrelevant to the point for decision, or, at least, leading to no principle by which the conclusions reached can be reconciled.[11] Many

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[7] 1879, Glavin v. Rhode Island Hospital, 12 R. I. 411, 423, 34 Am. Rep. 675.

[8] 1921, Weston v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S. E. 785, 786.

[9] 1911, Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913, A. 883.

[10] 1895, Hearns v. Waterbury Hospital, 66 Conn. 98, 123, 33 Atl. 595, 31 L. R. A. 224.

[11] 1909, Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 118, 117 S. W. 1189.

of the opinions rest on reasons or grounds which may well be challenged as fallacious.[12] However, "the identity of conclusion reached, though by different roads, is a strong proof of its correctness."[13]

§ 814. **Railroad Hospitals.** Hospitals maintained by railroad companies and other corporations, either exclusively out of their own funds or in whole or part out of deductions made in the wages of their employees, for the purpose of providing attendance to sick and injured employees, present an interesting problem. On the one hand, employers of large numbers of workmen should certainly be encouraged to establish hospitals for their employees by exempting them from damage suits for the negligence of their properly selected employees.[14] On the other hand, it may well be said that it is in the pecuniary interest of such employers to maintain a state of health and capability among their employees as instrumentalities of their business, which consideration in a real sense results in a profit.[15] In determining whether such a hospital is a charity, it makes an important difference whether the fund taken from the wages of its employees is used to make a profit or is so small as to be insufficient[16] even to cover expenses.[17] If the fund is raised with a view to financial profit, it will not be entitled to any consideration as a charity.[18] Where, however, it is maintained solely by the company[19] or is not maintained with a view to profit, though a deduction is made from the wages

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[12] 1908, Kellogg v. Church Charity Foundation, 112 N. Y. Supp. 566, 567, 128 App. Div. 214.

[13] 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 304, 47 C. C. A. 122, 65 L. R. A. 372.

[14] 1915, Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n, 97 Kans. 480, 155 Pac. 920.

[15] 1909, Zumwalt v. Texas Central R. Co., 56 Tex. Civ. App. 567, 571, 121 S. W. 1133 (Reversed 103 Tex. 603, 132 S. W. 113).

[16] 1900, Hanway v. Galveston Ry. Co., 94 Tex. 76, 58 S. W. 724. See 1901, Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372 (Affirming 101 Fed. 896); 1903, Big Stone Gap Iron Co. v. Ketron, 102 Va. 23, 27, 45 S. E. 740, 102 Am. St. Rep. 839.

[17] 1913, Kain v. Arizona Copper Co., 14 Ariz. 566, 573, 133 Pac. 412.

[18] 1899, Texas & Pacific Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173; 1902, Sawdey v. Spokane Falls & N. R. Co., 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880; 1908, Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 S. W. 109, 124 Am. St. Rep. 786.

[19] 1895, Eighmy v. Union Pacific R. Co., 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296.

of its beneficiaries,[20] it will be treated as a charity and hence will not be held responsible for the negligence of its carefully selected surgeons and other employees.[21] Where, however, it has failed to exercise ordinary care in the selection of these servants, it will be held to be liable.[22] Hence, a complaint alleging that the plaintiff became a contributor to the fund, and that he was injured through the negligence of its physician, is demurrable for not stating that the association failed to exercise proper care in their selection.[1] Of course, a person treated by the physician of such a relief department must prove the negligence of such physician.[2]

§ 815. **Injury to Employees.** It has been seen that some courts hold that a waiver on the part of the beneficiary of a charity is the real ground of exemption. This certainly does not apply to a person who is not a beneficiary. "The law may imply an intention on the part of the donors of the charitable funds that such funds shall be used for the charitable purpose only, and then imply an acquiescence in this intention by all persons who accept the benefit of the charity, and in that way spell out a waiver by such persons of any responsibility of the institution for the negligence or torts of its servants. If the courts want to exempt such institutions, this may be a tenable, though some may think a rather

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[20] 1916, Arkansas Midland Ry. Co. v. Pearson, 98 Ark. 399, 411, 135 S. W. 917, 34 L. R. A. (N. S.) 317; 1915, Nicholson v. Atchison Topeka & Santa Fe Hospital Ass'n, 97 Kans. 480, 155 Pac. 920; 1903, Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456; 1910, Barden v. Atlantic Coast Line R. Co., 152 N. C. 318, 328, 67 S. E. 971; 1903, Poling v. San Antonio & A. P. R. Co., 32 Tex. Civ. App. 487, 75 S. W. 69; 1900, Galveston H. & S. A. R. Co. v. Hanway, 57 S. W. 695 (Affirmed 94 Tex. 76, 58 S. W. 724); 1910, Texas Cent. R. Co. v. Zumwalt, 103 Tex. 603, 132 S. W. 113 (Reversing 56 Tex. Civ. App. 567, 121 S. W. 1133); 1910, Wells v. Ferry Baker Lumber Co., 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; 1895, Richardson v. Carbon Hill Coal Co., 10 Wash. 556, 648, 39 Pac. 95; 1894, Union Pacific Ry. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 14, 19 U. S. App. 712, 23 L. R. A. 581. Followed 1895, Pierce v. Union Pacific R. Co., 66 Fed. 44, 13 C. C. A. 323, 32 U. S. App. 48.

[21] 1898, Galveston, Harrisburg and San Antonio Railroad Co. v. Scott, 18 Tex. Civ. App. 321, 324, 44 S. W. 589.

[22] 1907, Illinois Central Ry. Co. v. Buchanan, 126 Ky. 288, 103 S. W. 272, 31 Ky. Law Rep. 722 (Reversing 27 Ky. Law Rep. 1193, 88 S. W. 312); 1893, Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

[1] 1903, Plant System Relief and Hospital Department v. Dickerson, 118 Ga. 647, 650, 45 S. E. 483.

[2] 1901, Georgia Northern Railway Co. v. Ingram, 114 Ga. 639, 40 S. E. 708.

ingenious or far-fetched ground on which to do it. But no such acquiescence or waiver can be attributed to an outsider.[3] There are no valid grounds upon which it can be held that the rights of those who are not beneficiaries of a trust can be in any way affected by the will of its founder. The rights of such persons are created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. A person should not be allowed to nullify the law of the state, even in creating a public charity. If the advantage accruing from such a charity is to be the ground for exemption, the argument should be addressed to the legislature and not to the courts.[4] A charity founded to benefit mankind should not be allowed to avoid doing justice to its very employees. It, like other persons, must be just before it is generous. Besides, a rule which exempts it from liability may actually prevent its growth or even bring about its extinction. It might conceivably become impossible for it to procure employees if these employees are not protected from injustice. A young woman employed by a hospital at ten dollars a month who, as an additional consideration, receives instruction and gathers experience in practical nursing, has, therefore, been allowed to recover damages from the hospital for contracting diphtheria from a patient whom she was ordered to nurse without being told the nature of his ailment.[5] Other similar cases have been decided by other courts.[6]

§ 816. **Strangers.** What is true of an employee certainly holds doubly good in regard to a stranger. It would be manifestly unjust and contrary to public policy to hold that a person run over and injured on a public highway by a horse and wagon belonging to a charity and driven negligently by its servant would not be entitled to recover, while

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[3] 1908, Kellogg v. Church Charity Foundation, 112 N. Y. Supp. 566, 570, 128 App. Div. 214.

[4] 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 252, 253, 110 N. W. 951, 10 L. R. A. (N. S.) 74.

[5] 1906, Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

[6] 1907, Bruce v. Central M. E. Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74; 1913, McInerny v. St. Luke's Hospital Ass'n, 122 Minn. 10, 15, 141 N. W. 837; 1912, Armendarez v. Hotel Dieu, 145 S. W. 1030, 1031 (Tex. Civ. App.); 1914, Hotel Dieu v. Armendarez, 167 S. W. 181 (Tex. Civ. App.).

a person similarly injured by the negligence of the employee of an express company would recover. A hospital, therefore, is liable for such an injury though it has not been negligent in selecting its servant.[7] Persons negligently run over by the ambulance of a hospital,[8] or by the automobile of a library[9] have, therefore, recovered damages for their injuries. Such liability has even been declared under the trust theory. Says the New York appellate court: "It must be regarded as settled that a charitable corporation is not exempt from liability for a tort against a stranger, because of the fact that it holds its property in trust to be applied to purposes of charity."[10]

§ 817. **Invitees.** Midway between servants and strangers there are invitees who have certain rights, the breach of which is attended with legal consequences.[11] Hence, a physician injured in a hospital by an x-ray machine while accompanying a patient has been allowed to recover.[12] Similarly, mechanics injured while making repairs on the premises of a charitable institution have recovered the same as if the damage had occurred on the property of any other owner.[13] However, a student, who is a spectator at the taking down of a chimney at the institution which he attends, is a mere looker-on who must take care of himself.[14]

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[7] 1912, Basabo v. Salvation Army, 35 R. I. 22, 43, 44, 85 Atl. 120, 42 L. R. A. (N. S.) 1109. 1923, Hamburger v. Cornell University, 199 N. Y. Supp. 369, 374, 204 App. Div. 664.

[8] 1908, Kellogg v. Church Charity Foundation, 112 N. Y. Supp. 566, App. Div. 214; 1917, Van Ingen v. Jewish Hospital of Brooklyn, 164 N. Y. Supp. 832, 99 Misc. 655 (Affirmed 169 N. Y. Supp. 412, 182 App. Div. 10).

[9] 1913, Johnson v. Chicago, 258 Ill. 494, 101 N. E. 960 (Affirming 174 Ill. App. 414). But see 1906, Fordyce v. Woman's Christian Library Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

[10] 1911, Kellogg v. Church Charity Foundation, 203 N. Y. 191, 194, 96 N. E. 406; 38 L. R. A. (N. S.) 481, Ann. Cas. 1913, A. 883.

[11] 1914, Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S. E. 13, 51 L. R. A. (N. S.) 1025. But see 1885, Benton v. City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436.

[12] 1918, Marble v. Nicholas Senn Hospital Ass'n, 102 Neb. 343, 167 N. W. 208.

[13] 1910, Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62; 1909, Gartland v. New York Zoological Society, 120 N. Y. Supp. 24, 135 App. Div. 163.

[14] 1902, Currier v. Dartmouth College, 117 Fed. 44, 50, 54 C. C. A. 430 (Affirming 105 Fed. 886).

§ 818. **Workmen's Compensation Acts.** The enactment of workmen's compensation acts has given rise to a large and ever growing volume of new case law. Their application to employees of charitable institutions presents an interesting question on which naturally there are as yet but few authorities. Says the Massachusetts court: "Undoubtedly the rules of law declared by this court relating to persons injured while in the employ of charitable institutions may be changed by the legislature, still that such change was made by the workmen's compensation act is not to be inferred in the absence of a plain intention on the part of the legislature to that effect."[15]

§ 819. **Federal Courts.** Federal courts follow the decisions of the state where the controversy has arisen in deciding the question of the liability of a charitable institution. The fact that the plaintiff is a non-resident and, therefore, has less claim on the state's public charities than its own citizens, does not enable him to obtain in the federal courts relief which the state court would deny to a citizen. "The jurisdiction of the federal court given to non-residents against citizens of the local state, is to insure an impartial trial, not to create rights of action which citizens of the state, in like condition, do not have.[16]

§ 820. **Summary.** A number of states, following English **dicta,** exempt charities from all tort liability against beneficiaries as well as others on the ground that public policy demands that the trust fund be not diverted to paying damages. The great majority of the courts, however, do justice to employees, strangers and invitees by holding the charity to the same degree of care exacted from other entities. In regard to beneficiaries they hold the charity liable for injuries resulting from the negligence of the trustees or managers in selecting incompetent servants, but not for the negligence of servants carefully selected. This rule applies also to the various relief funds created by corporations, provided that these funds are not used for the purpose of making a

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[15] 1918, Zoulalian v. New England Sanitarium, 230 Mass. 102, 105, 119 N. E. 686, L. R. A. 1918, F. 185.

[16] 1918, Paterlini v. Memorial Hospital Ass'n, 247 Fed. 639, 643, 160 C. C. A. 49, Certiorari denied 246 U. S. 665, 38 S. Ct. 334, 62 L. Ed. 929.

financial profit. It does not apply, of course, to non-charitable ventures or to charities which are conducted by the public authorities. While the rule is well established, the reason given by the courts to support it are very various indeed. The most satisfactory reason advanced is that a charity has performed its whole duty when it tenders to a beneficiary a competent servant and that thereafter such servant becomes the servant of the patient rather than the servant of the charity.

APPENDIX

SUGGESTIONS FOR AND PRACTICAL FORMS OF CHARITABLE DEVISES AND BEQUESTS

I. GENERAL SUGGESTIONS

The decided cases, as they are commented on in this volume, show the pitfalls which in the past have doomed many a noble gift intended for charity. The following suggestions are submitted with a view to help the profession to avoid the most common mistakes which have been made in the past.

1. **Gift to Corporation.** Where a gift is to a municipal or charitable corporation, and is within its corporate powers (or sufficiently germane to them), no technical trust relation is established, though the gift is confined to one of a number of purposes for which the corporation is organized.[1] The words "in trust" should, therefore, be avoided. In such states as limit charity to corporate agencies, the gift may not go beyond the power of the corporation to take.[2] In states where individual trustees are recognized as instrumentalities for the distribution of charity, a gift in trust to a corporation but beyond its powers would not fail, as a new trustee would be appointed by the courts.

2. **Name of Donee.** The full technical names of corporation beneficiaries should, when possible, be ascertained, as looseness in this regard may lead to a contest between two or more corporations for the gift, and in some cases to an absolute failure of it.[3]

3. **States which Bar Gifts to Individuals in Trust.** In Minnesota,[4] Wisconsin,[5] Virginia,[6] West Virginia,[7] Maryland,[8] Louisiana,[9] and Mississippi,[10] gifts to trustees for charitable purposes are either entirely void, or of sufficiently doubtful validity to make it inadvisable to attempt to use them as in-

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[1] P. 225.
[2] Pp. 227, 228.
[3] Pp. 406-407.
[4] Pp. 43-44.
[5] Pp. 40-43.
[6] Pp. 21-24.
[7] Pp. 24-25.
[8] Pp. 25-27.
[9] Pp. 52-54.
[10] Pp. 45-46.

strumentalities. In the other states such gifts are generally upheld.

4. **Discretion of Trustees.** The discretion which may be vested in trustees has divided the courts, some holding that it may be as wide as is the entire field of charity, while others assign (without however defining) narrower limits in which this discretion must move.[11] This applies particularly to the class of beneficiaries created by the testator.[12]

5. **Power and Trust.** The testator should state specifically whether the authority conferred upon his appointees is a mere power which dies with them, or a trust which survives them.[13] In the latter case, he should make provision for the appointment of successors.[14]

6. **General and Special Intention.** The donor's general intention should be stated and distinguished in terms from his special intention.[15] Where the testator has only a special intention, he should so state and should also state that a **cy pres** application of his gift is not authorized. Where a general intention is defined, a **cy pres** application of the gift may advantageously be expressly authorized, except in states which do not recognize the **cy pres** doctrine.

7. **Mortmain Statute.** The mortmain statutes of the state, or states, under which the will becomes effective, should be carefully investigated, as they limit the capacity of both donors and donees in various degrees, and may lead to a partial or total failure of the gift.[16]

8. **Perpetuity Statutes.** Where the intention is to provide for certain relatives or other persons, or for some non-charitable purpose before the gift is to reach the charity, the local statutes against perpetuities should be carefully considered in order to prevent a collision with them. The gift must vest within the statutory time. Charities, however, may be limited on each other **ad infinitum**, provided that no private gift forms a link in the chain.[17]

9. **Non-Technical Words. Humane, Philanthropic, etc.** In all cases, the use of such non-technical adjectives as

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[11] Pp. 282-286; 301-304.
[12] Pp. 286-298.
[13] Pp. 277-279.
[14] Pp. 320-323.
[15] Pp. 86-95.
[16] Pp. 341-360.
[17] Pp. 361-380.

"humane," "liberal," "generous," "philanthropic," "benevolent," etc., should be painstakingly avoided. No other words than the technical words "charity" and "charitable" should be used in describing such gifts.[18]

10. **Conditions, Reverter Clause.** If testator desires to insert conditions, he should state whether they are precedent or subsequent, and should add a reverter clause so as to leave no room for a construction by which they are converted into covenants.[19]

11. **Religious Charities.** Where gifts are made to religious charities, the donor should carefully state his general intention,[1] as otherwise such gifts will be very narrowly construed.[2]

12. **Real and Personal Property.** Where only personal property is involved, the conveyancer may limit his legal investigation to the state of testator's residence. Where, however, real estate is in question, the laws of all the states in which it is situated should be investigated so as to fit the will into them.[3]

13. **Gift to Class.** Where a gift is intended for a certain class of charitable beneficiaries, it should not be made to this class direct (though some courts uphold even such a gift[4]), but should be to a personal trustee or corporation[5] for such class.

14. **Directions to be General.** Directions for the management of the trust should be short, concise, and general in their nature. Very specific directions are bound to result in difficulties and perplexities, if not the actual throttling, sooner or later, of the charitable gift.[6]

15. **Unincorporated Society.** Whether a gift direct to an unincorporated charitable society is valid, has divided the courts.[7] Where a gift for such a society is contemplated, much trouble will be avoided by making it to a trustee in trust for it, and by definitely describing the charitable pur-

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[18] Pp. 267-273.
[19] Pp. 436-444.
[1] P. 86.
[2] P. 95.
[3] P. 451.
[4] P. 318.
[5] Pp. 333-336.
[6] Pp. 257-261.
[7] Pp. 245-254.

poses which it is intended to serve.[8] This course is absolutely necessary in New York.[9]

16. **Verbal Understandings.** In limiting the discretion of trustees, no reference should be made to any verbal understandings which the testator may have with the trustees. A reference to some **existing** writing, however, is permissible, though it is better fully to express the intention in the will itself.[10]

II. FORMS

These forms are submitted merely as suggestions. On account of the diversity between the various states, and the shifting of the viewpoints of some of the courts, even in this day and generation no form that will fit every situation and every state can be devised.

1. **Preamble.** Whereas, I desire to leave (a part of) my estate to public,[11] charitable[12] purposes as they have been defined by the Statute of Elizabeth and its judicial constructions.[13] And whereas, I desire to obtain for my said gift the special favors which the law confers on donations for public charitable purposes.[14]

2. **Gift to Corporation in Existence.** Now, therefore, I give, devise, and bequeath to the following charitable[15] (or municipal) corporations ..... for their charitable purposes,[16] (or for the following of their charitable purposes .....) the following property .....[17] In case any of the above-mentioned corporations shall be disqualified to receive the gift above designated, or shall not be in existence when this will takes effect,[18] I give, devise, and bequeath such gift, or portion of gift thus made void or voidable, to ..... in trust, to apply the same to such other corporations organized for the same or similar charitable purposes as he may designate.

3. **Gift to Corporation to be Organized.** Now, therefore,

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[8] Pp. 238-242.
[9] Pp. 248, 249.
[10] Pp. 262, 263.
[11] Pp. 140-143; 159, 160.
[12] Pp. 267, 268.
[13] Pp. 124-128.
[14] Pp. 387-388.
[15] P. 322; Charitable corporation as quasi-trustee, p. 326; absolute gift, p. 329; power of corporation to take, p. 365.
[16] Pp. 225-228.
[17] P. 243.
[18] Pp. 96-98.

I authorize and direct my executors, within a reasonable time after my death, to procure the incorporation of a charitable corporation,[19] for the following charitable purposes[20] ..... I give, devise, and bequeath to said corporation,[1] for the charitable purposes just named, the following property .....

4. **Gift to Trustee.** Now, therefore, I give, devise, and bequeath to .....,[2] as trustee,[3] the following property[4] ....., in trust for the following charitable[5] purposes[6] .....

The authority conferred upon my said trustee shall be a trust and not a mere power.[7] In case said trustee for any reason shall fail[8], or refuse,[9] or be unable[10] to execute said trust, or be nonexistent,[11] a successor[12] shall be appointed by ....., and said successor shall have the same power and authority[13] as is hereby conferred upon said original trustee.[14]

The authority conferred upon my said trustee shall be a personal power only. In case said trustee shall die, or refuse to act, or become permanently incompetent to act, or be nonexistent before executing said power, the property given to him shall revert[15] to ..... and shall not be subject to any **cy pres** application.

Said trustee (and his successor) shall (or shall not) give bonds to the ..... court in such sum as said court shall determine.[16]

5. **General and Special Intent.** My general intention is as follows: ..... My special intention[17] is as follows: ..... If my special intention shall for any reason be, or become, in whole or part, illegal,[18] or imprac-

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[19] P. 232.
[20] These purposes should be clearly and definitely stated. Pp. 238-242.
[1] Pp. 229 231.
[2] Pp. 225, 226. A charitable corporation or a municipality may be such trustee. P. 328.
[3] Pp. 309, 325. Municipal corporation as trustee, p. 333; State or United States as trustee, p. 339.
[4] P. 243.
[5] Pp. 267-273.
[6] P. 238.
[7] P. 277.
[8] P. 314.
[9] P. 313.
[10] P. 311.
[11] P. 316.
[12] P. 320.
[13] P. 323.
[14] P. 114.
[15] Pp. 98, 437.
[16] P. 325.
[17] P. 86.
[18] P. 101, 147.

ticable,[19] my general intention shall be carried out **cy pres,** and the provisions of this will shall be liberally construed with that end in view.[20]

In executing this will, I have only a special intention and do not entertain any general intention.[1] In case my said special intention shall become impossible or illegal, the property shall revert[2] to .....

6. **Appointment of Visitors.** I appoint the following persons ..... as visitors of my said charity, with the following powers of supervision and control ..... (or with such powers as are customarily exercised by such visitors).[3]

7. **Annuity Provision.** Said gift shall be subject to an annuity of ..... per year, to be paid on the ..... day of ..... of each year to ....., until such time as said ..... shall die (or become of age, or marry, etc.).[4]

8. **Seat of Charity.** The following real estate ..... shall be, and remain the seat of the charity created by me. If, however, at any time, by the change of circumstances, said property, in the opinion of ....., shall become inappropriate or burdensome, I empower my trustees or their successors (or the corporation donee) to sell it, and to invest the proceeds in another piece of land which shall be more favorably located.[5]

The following real estate ..... shall be and remain the seat of the charity, and shall not, in whole or part, be parted with for any purpose whatever. In case the charity shall at any time remove to another location, or cease to exist, or substantially change its objects, or sell or dispose of any part of said real estate, the same shall revert[6] to ..... This clause is intended as a condition subsequent,[7] and shall be enforced as such by the courts.

9. **Memory Perpetuation.** This gift shall perpetuate the

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[19] Pp. 88, 103.

[20] P. 77. For states where the cy pres doctrine does not exist see p. 79.

[1] P. 86.

[2] Pp. 98, 437.

[3] Pp. 418-420.

[4] P. 331. Care must be taken that this provision does not violate the State perpetuity statute. A provision making future generations annuitants would probably bring about this result. Chapter 13, p. 398.

[5] Pp. 109-114.

[6] Pp. 98, 437.

[7] Pp. 440-445.

memory of ..... in the following manner[8] ..... If, however, this becomes impossible or illegal, a **cy pres** application of my gift shall be made. (In case it shall be, or become impossible, or illegal, to accomplish this object, said gift shall revert[9] to ..... and shall not be carried out **cy pres**.)

10. **Insufficiency.** In case my gift shall prove to be insufficient to accomplish my full design, or shall, by losses, be so reduced as to make such accomplishment impossible of achievement,[10] a **cy pres** application shall be made,[11] (or the property shall revert to .....[12]).

11. **Mortmain Provision.** If any of my above-mentioned gifts shall be partially void because certain relatives survive me,[13] or if my death shall occur within such time from the execution of this will, as to render any such charitable gifts wholly void,[14] I give, devise, and bequeath such gift, or gifts, to ....., absolutely having full confidence that said ..... will, by a writing duly executed within a reasonable time after my death, voluntarily apply said gift or gifts to the charitable purposes which I have expressed. Said ..... has not been advised of this confidence, and shall not be under any legal obligation to comply with it.[15] This provision shall be personal to said ....., and shall not be construed in favor of his heirs, distributees, devisees, or legatees in case he shall die before me.

12. **Non-Charitable Purposes.** In case any of my purposes above described, which I believe to be charitable (as appears by this will), shall not be charitable in the technical[16] meaning of the law, the proper court shall regard such purposes as non-existent, if this shall be necessary to uphold this will in whole or part.[17]

13. **Reversion and Cy Pres Application.** The property hereby given to charity shall in no case revert[18] to my heirs or private legatees and devisees, but shall be devoted to the

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[8] Pp. 129-133.
[9] Pp. 98, 437.
[10] P. 149.
[11] Pp. 106-108.
[12] Pp. 98, 437.
[13] Pp. 356-358.
[14] Pp. 350-352.
[15] Pp. 353-355.
[16] P. 122.
[17] P. 445.
[18] P. 437.

charitable purposes above outlined, if necessary, by a liberal[19] application of the **cy pres** doctrine.[20]

In case the above-mentioned charitable trusts shall, for any reason, fail, the property bequeathed and devised for its benefit shall revert[1] to ....., and shall not be subject to the application of the **cy pres** doctrine.

In case the judicial **cy pres** power shall be insufficient to save my gift to charity, it is my desire that the legislature of the proper state shall intervene and prevent the frustration of my charitable purpose.[2]

14. **Accumulation.** Said trustee shall administer said property, and collect the rents and profits for ..... years (or until a designated event), and shall then apply it to the charitable purposes above outlined.[3]

III. GIFTS FOR MASSES

Gifts for masses, though generally quite small, are very numerous. For this reason, in addition to the pages in the text which deal with the subject,[4] a short practical analysis of the situation, accompanied by a few simple forms for such gifts, would seem to be in order.

The safest method of bequeathing or devising property for masses, in the ordinary case, is to make the gift direct to the officiating priest of a designated church, not naming him (as he may at any time die or be succeeded by another), but describing him by the office which he holds. Directions should then be added that he expend the gift for masses for the repose of the soul of testator, and of such other person as the testator may wish to designate. Such a gift will be valid even where the English charity doctrine is not recognized.[5] It will not be construed as creating a trust relation, as the priest named or described is not to expend the money, but is to keep it.[6] If, on the other hand, the gift is to some

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[19] Pp. 77, 228, 241, 376, 379, 389, 441, 442.

[20] See Chapter 3.

[1] Pp. 98, 437.

[2] P. 116.

[3] Pp. 381-384.

[4] Pp. 177-180.

[5] 1897, McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724.

[6] 1920, In re Hamilton, 181 Cal. 758, 186 Pac. 587. But see 1898, Kerrigan v. Tabb, 39 Atl. 701 (N. J.).

bishop for masses in designated churches (or in churches which such bishop or some other appointee is given power to designate), the bishop is not to keep the money, but to expend it and, hence, a true trust relation comes into being.

It will not be in the best form to attempt a gift for masses to an unincorporated church, though such a gift would, in most states, be upheld as a gift to the officiating priest of such church.[7] Gifts to an incorporated church, however, are in good form, and are sometimes preferable to gifts to the officiating priest of such church.

Charitable corporations which maintain a chapel, such as hospitals,[8] colleges,[9] and convents may also be proper donees of such gifts. They will, however, not be trustees in the technical sense of the word, but will take the gift simply for one of their corporate purposes.[10]

Gift to Priest. I give, devise, and bequeath to the officiating priest of the ..... church, the following property ..... I direct such priest to use such gift for the purpose of saying masses for the repose of my soul and the soul of my deceased .....

Gifts to Bishop in Trust. I give, devise, and bequeath, the following property ..... to ..... Bishop of the Roman Catholic Diocese of ....., in trust, to cause masses to be offered for the repose of my soul and the souls of ....., in the following churches, to-wit:.....[11]

Gift to Incorporated Church. I give, devise, and bequeath to the ..... church the following property ....., to be applied by it for the following purpose....., ("to be expended in saying masses for the repose of my soul and the soul of my deceased father"[12]).

Gift to Other Corporation. I give, devise, and bequeath the following property ..... to the following corpora-

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[7] 1918, Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490.

[8] 1907, Johnson v. Hughes, 187 N. Y. 446, 80 N. E. 373.

[9] 1900, Kerrigan v. Connelly, 46 Atl. 227 (N. J.).

[10] P. 225.

[11] 1920, In re Hamilton's Estate, 181 Cal. 758, 186 Pac. 587.

[12] 1898, Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40. L. R. A. 730, 63 Am. St. Rep. 241.

tion ....., to be applied and used by it for the following of its corporate purposes ..... ("for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital"[13]).

[13] 1907, Johnson v. Hughes, 187 N. Y. 446, 80 N. E. 373.

INDEX

Abandoned—
Building, exemption, 505
Hospital, termination of trust, 438
Abandonment—
Termination of trust, 437
Abbot of St. Albans—
Statement to the conqueror, 15
society, 251
Abbreviation—
Of donee's name, 414
Absolute Gift—
Charitable corporation, 329, 330
Corporation, 234
Unincorporated society, rules of
Absurd—Gift, effect, 149
Absurdity—
Classification, effect, 291
Abuses — See Misappropriation, Perversion, Mismanagement
Charity, America, 184
England, 395
John Clark Will, 48
Length of time, 403
Of fund, effect, 146
Religious charities before statute of Elizabeth, 125
Reversion, 442
Trustee, court interference, 275
Visitorial power, 418, 419, 424, 425
Academy—See College, Education, Public School, Parochial School, School, University
Cy pres application, 95
Of science, 207
Private school, exemption, 514
Stock, charity, 331
Acceptance—
By beneficiary, 151
Of charity, 151
Trustee, personal trust, 313
Accounting—See annual accounting
Of property, by trustee, 324
Provision that trustee shall not account, effect, 424
Yearly, North Carolina, 49
Accumulation—See Fund
Authority for, 402
Cy pres, 87
For charity, validity, 367
Perpetuity rule aimed against, 363
Profit, effect, taxation, 475
Tilden Act, 36
Valid in part only, 384
Validity, court discretion, 381
Void, principal gift, valid, 384
Acquiescence—
Secret trust, mortmain, 353
Actually Occupied—Taxation, 504
Apportionment, taxation, 510
Exclusively, stricken out by legislature, 485
Adaptability—
Charity, necessity, 257
Additional Trustees—
Power conferred, 321
Adequacy—See Inadequacy
Of charity, 149
Administration Expense—
Effect, 146
Administrative Details—
Liberty in, 258
Administrator—
Not to act as trustee, 310
Adornment—Monument, 208
Advance Insurance—
Immediate on death, charity, 196
Advanced Education—
Elementary, cy pres, 109
Advantage—Sale, cy pres, 110
Adverse Possession—
Against state, 27
Termination, 435
Advise—
Trustee, asking, costs, 432
Affections—Good, charity, 122
Africa—Mission, 173
African Children — See Negroes, Children
United States, class, 305
Age—Classification by, 295
Aged—
Amelioration of condition, 292
Gift for, 41
Aged Persons—
Asylum, cy pres, children, 83
Agreement—See Contract
Creating charities, 153
Cy pres, 106
Diversion of trust funds by, 431
Agricultural — See Farm, Dairy Farm, Garden, Greenhouse, Horticulture
Chemistry, chair for, 204
School, farm exempt, 496
Agricultural Society—
Damage liability, 539
Not a charity, 141
Agricultural Student—
Cornell, eye lost, damage liability, 551
Agriculture, 205—
Professorship, 204
Alabama—
Class must be designated, 284

(References are to pages)

Cy pres, 80
Legal development, 62
Pay patient, damage liability, 548
Alexandrian Library—
Destruction, 207
Alienability—
Free, property, importance to state, 361
Alienation—
Power suspended, expunging, provision, 400
Termination of trust, 437
Almoner—See Trustee
Charity not dependent on existence of, 115
Personal trust, 278
Almsgiving—
Does not exhaust charity, 121, 122
Almshouse—
Benefit from beneficiaries, exemption, 525, 526
Blind, consumptive, home, hospital, 525
Alternative—
Perpetuity, event, 379
Provision, cy pres, 100
Ambiguity—See Latent Ambiguity, Patent Ambiguity
Examples, 406
Language, effect, 399
Latent, 408
Local or general church as trustee, 310
Patent, 408
Strict construction of exemption, 463, 464
Ambulance—
Injury to stranger, damage liability, 557
Livery stable, hospital, damage liability, 553
Service, municipal, hospital, damage liability, 538
America—
English charity law applicable, 9
American Baptist Publishing Society—Colporteur, 41
American Colonization Society—
Gift to, 229
Slaves, manumission, 312
American Cy Pres Doctrine—See Cy Pres Doctrine, English Cy Pres Doctrine
Form of, 75, 76
Liberal construction, 75
Presupposes valid gift, 78
American Freemen's Union Commission—
Cy pres, 85
American Law—
Class, stricter than English, 287
American Medical Association—
Ethics, subscription, hospital physicians, 479
American Phase—
Kentucky statute, 50
American Philosophical Society—
Benjamin Franklin, 466
Amicus Curiae—
As plaintiff enforcing trust, 430
Amount—
Small, perpetuity, 379
Sum not to exceed a certain, validity, 244
Amusement—See Entertainment, Recreation, Theatre, Dancing, Billiard Room, Card Room, Club, Concerts, Park, Playgrounds, Pleasure, Summer Home, Athletics, Ballrooms, Camp Association, Concerts
Athletics, taxation, 496
Charity, 131
Dancing, 210
Parks, 215
Y. M. C. A., exemption, 516
World War, 210
Analogy—
Extension of statute of Elizabeth, 127
Ancient Instrument—
Abuse, construction, 403
And—Construed as "or", 467
Animals—See Horses
Cruelty to, 193
Cruelty to, league, exemption, 532
Annapolis—
Naval academy, fitting for, 205
Annual Accounting — See Accounting
Courts, power, 425
Annual Reports—
Vouchers, power of court to enforce, 426
Annual Use—Cy pres, 86
Annuity—
Accumulation, validity, 383
Attached to trust, effect, 331
Certain sum, validity, 244
Charged on land, charity, 364
Charge on real estate, exemption, 486
Donor making provision for himself out of his charity, 298
Gift to charity subject to, 378, 384
Mortmain, 353
Receipt by teacher from house donated by him, exemption, 493
Seven persons, perpetuity, 379
Trust fund, subject to taxation, 512
Anti-Saloon League—See Liquor
Power to take charity, 252
Trustee, 193
Apartment House — See Hotel, Model Tenement
Exemption, 506

(References are to pages)

Appeal—
Intervention by attorney general, 429
Power of courts, visitors, 423
Appointed—
In statute of Elizabeth, 11
Appointment—
Court, trustee, 310
New trustee, attorney general, 429
New trustee, remedy where no condition, 440
Apportionment—
Examples, 511
Of exempt and non-exempt property, 509
Of property which produces payment, exemption, 481
Separation of taxable and exempt, difficulties, 510
Taxation, 533
Trustees, power of, 281
Apprentice — See Franklin, Benjamin
Home, gift to, 227
Loan, repayment, death, 84
Appropriate Place—
Mission, effect, 148
Approximation—What is, 83
Arbitrary Power—
English cy pres doctrine, 73
Arbitration—
Diversion of trust funds by, 431
Arch—In civic center, 216
Ornamental, 132, 216
Archbishop—See Bishop
Bishop, exemption, 525
Architect—Cy pres, 85
Architecture—
Naval, fitting for, 205
Park, memorial, 216
Arizona—
Legal development, 62, 63
Arkansas—
Compromise, 432
Legal development, 61
Trust fund theory, damage liability, 544
Armory—
Fair, taxation, 485n
Gift to, 218
Of school, exemption, 495
Arsenal Grounds—
Trustee appointed, 314
Arts—See Fine Arts, Studios
Academy of fine, exemption, 462
Domestic, useful, mechanical, 205
Education, 208
Educational charity, taxation, 525
Park memorial, 216
Prices, 208
Professorship, 204
Room to preserve donor's collection, cy pres, 94
Art Institute—
Gift to, perpetuity, 367
Artificer—
Benjamin Franklin will, 195
Assessment — See Exemption, Taxation, Inheritance Tax
Cemetery exempt from, 517
Charity, lodge, 145
Day, summer home, occupancy taxation, 499
Definition, 458
Exemption in New Jersey, 469
Inconsistent with charity, 143
Assignment—
By extinct society, termination of trust, 435
Compromise treated as, 525
Astrology—Gift for, 159
Asylum—See Insane Asylum
Aged persons, cy pres, 83
Deaf and dumb, 191
Fund, charity, exemption, 531
Gift to Trustees, discretion, 262
Atheism—Charity, 159
Athletic Field—
Exemption, 496
Rented in summer, taxation, 485n
Taxation, 514
Athletics — See Amusement, Entertainment, Recreation
School, taxation, 496
Support by store in college, exemption, 486
Attendant—
Carefully selected, damage liability, 546
Land of cemetery for use of, exemption, 518
Attorney—
Devisee, secret trust, 354
School in house of, exemption, 490
Attorney General—
Action by, 239
As trustee, 326
Intervention, 427
North Carolina provision, 49
Party action for cy pres application, 115
Plaintiff or defendant, 429
Proper party, 427
Represents public, visitorial power, 422
Scheme by trustees, coercion, 274
Settlement of trust litigation, party, 432
Tilden Act, 35
Visitorial power, 421
Auditor General—Pennsylvania, 56
Automobile—
In barn of school, exemption, 486
Of cemetery, exemption, 520

(References are to pages)

Autopsy—
Unauthorized, damage liability, 548
Bakeshop—
Of school, exemption, 495
Baldwin, J.—
Influence on charity doctrine, 5
Ballrooms—See Amusement
Use of charity property for, exemption, 510
Band—Not a charity, 133
Bank—
Savings, not charity, 196
Bank Stock—
Gift, perpetuity, 364
Sale, condition against, 113
Subscription by charity, favor, Connecticut, 417
Bankers—
Benefit association, sick member of, gift to, 291
Baptist—
Charity limited to, 292
Baptist Church—As charity, 165
Barn—
School ground for automobile, exemption, 486
Baseball Field—
Exemption, 496
Beat—
Children limited by, 296
Bed—See Free Bed
Endowment, 227
Free, cy pres, 85
Hospital, cy pres, 107
Beekman Family—
Corporation to aid members of, 300
Bells—
Chimes, stock, war, cy pres, 104
Fire truck, cy pres, 95
Belonging—
Construction, renting of property, 472
Beneficiaries—See Cestui que trust
Acceptance of charity, 151
Also contributors, visitorial power, 421
As parties, 431
Attorney general party in action by, 428
Certainty, 220
Church officer as, 184
Defined, charity excluded, 236
Definiteness, Maryland, 26
Definiteness, Wisconsin, 41
Direct gift to, 220
Foreign, Louisiana, generally, 447
Indefiniteness, 137
Indefiniteness, church, 164
Indefiniteness, essential, 234
Indefiniteness, Tilden Act, 35
Labor, taxation, 531
Must be uncertain, 143
Plaintiff to enforce trust, 430
Private trust, uncertainty, 221
Reasonable certainty, Kentucky, 50
Refusal of trustee to select, 314
Represented by attorney general, 428
Selection, discretion, 261
Selection, discretion confined to, 263
Uncertainties, 36, 235
Uncertainty, Georgia, 51
Benefit—
Beneficiaries, almshouse, exemption, 526
Incidental rent, taxation, 485
To donor, masses, 178
Benefit Society — See Mutual Benefit Societies
Benevolence—See Philanthrophy
Charitable, 272
Definition, distinct from charity, 268, 269, 270
Discretion, validity, 264
Lodge, charity, 145
Not charity, 140
Objects of charity, 158
Bequest—See Devise
Foreign corporation, mortmain, 453
Unincorporated society, 250
Bible—
Instruction may be limited to, 206
Readers, India, education, 227
Society, charity, 172
Society, dissolution, cy pres, 98
Bible Passages Referred to—
Deuteronomy—
Ch. 15 v. 7-9,—2
Ch. 23 v. 19, 20,—2
Ch. 24 v. 13, 17, 19, 20, 21,—2
Exodus, Ch. 22 v. 22, 26, 27,—2
Ezikiah, Ch. 18 v. 8,—2
Job, Ch. 22 v. 6,—2
Leviticus—
Ch. 23 v. 22,—1
Ch. 19 v. 9, 10,—1
Luke, Ch. 9 v. 58,—186
Mark, Ch. 14 v. 9,—132
Matthew—
Ch. 8 v. 20,—186
Ch. 26 v. 13,—132
Ch. 28 v. 19,—171
Nehemiah, Ch. 5 v. 7,—2
Psalms, Ch. 15 v. 5,—2
Ruth, Ch. 22 v. 15, 16,—2
Bigotry—
Gift to Boston investigator, 159
Billiard Room in Lodge—
Exemption, 486
Binney, Horace—
Definition of charity, 128, 129
Girard will case, 6
Birthplace—
Class limited by, 291
Bishop—See Archbishop, Diocese

Covers archbishop, 525
Discretion, scheme for hospital, 281
Gift for church, discretion, 260
Gift for masses, 180
Gift to, discretion, 304
Residence in school, exemption, 492
Support as charity, 169
Title in, exemption, 459n
Trustee, diocese, 303
Trustee, mormon church, 273
Black Race—See Negroes, African
Children
Classification by, 294
Blank—
In will, immaterial, 240
Blazed Trail—
Testator's words as, 397
Blind, 205—
Home, state, gift to, 218
Institute as almshouse, exemption, 525
Manufacturing establishment for, 191
Board—
College, gift to corporation, 229
Of charities, New York, 433
Payment, taxation, 479
Board of Directors—
Visitors as counterpart, 419
Board of Education—
Damage liability, 538
Gift to, 213
Library, gift, 215
Board of Home Missions—
Beneficiaries, 238
Boarding House—
Fraternity house as, exemption, 516
School, exemption, 499
Use of school in vacation, 485
Boarding School—
Exemption, 486, 487
Boiler Room—
Of school, exemption, 495
Bonds—
By charitable trustees, 325
Construed to cover cash, 244
Investment, cy pres, 91, 105
Investment of endowment funds, 513
Bookkeeping—
Rent charged as, taxation, 494
Books—School, purchase of, 214
Store, denominational, exemption, 488
Sunday school, purchase as charity, 170
Boston—
Benjamin Franklin will, 195, 218
Investigator, gift to, 159
Needy Masons, class, 293
Botanical Garden—207
Bottles—
Hot, incompetent employees, damage, liability, 545
Bowdoin College—Exemption, 528
Bridge—Gift to, 218
Brook, Phillips—
Monument to, 208
Brothers—See Relatives
Class, 300
Of donor, discretion of trustee, 265
Building—
Destroyed or incomplete, exemption, 504, 505
Does not cover garden, 498
Exemption, covering land on which situated, 468
Land subsequently acquired, exemption, 461
Let to tenants, taxation, 488
Bull, Ole—Memorial, 133
Burial—See Cemetery, Grave
Masses as adjunct, 179
Burial Ground—
Blast furnace, sale, 113
Private, municipality, power, 334
Burial Lot—
Private, upkeep, 369
Upkeep, 368
Burned—
Building, exemption, 505
Hospital, termination of trust, 438
Property devised to be, 147
Burying Ground—
Pennsylvania early statute, 55
Business—
Municipality, 213
Property, charity, damage liability, 541
Teaching, 205
Business Block—
Investment of cemetery proceeds in, exemption, 520
Investment of endowment funds, 513
Leased, exemption, 508
Business College — See Stenography School, Trade School
Taxation, 514
Business Enterprise—
Taxation, 498
Business Men's Club—
Gift to, 213
Business Men's Club Room—
Library, 334
Not a charity, 213
California—
Court, discretion, 277
Definition, 140
Eleemosynary, charity, 272
Foreign corporation, inheritance tax, exemption, 530
Legal development, 62
Lodge, charity, 145

(References are to pages)

Masses, mortmain, 180
Trust statute, 62
Waiver, mortmain, 357
Cambridge—
Gift to students, cy pres, 91
Camden—
Definition, 134
Camp Association — See Amusement, Chautauqua
License fee, confederate soldiers, 458
Pension, 190
Campmeeting Grounds—
Exemption, 499
Campus—See University, College
As section, 462
Exemption, 496
House separated from, exemption, 501
Improvement, applying rent to, 476
Lot adjacent, taxation, 504
Cancer—Sufferer from, 298
Capital—
Expenditure, trustee, 276
Stock, exemption covers lot and building, 467
Carbolic Acid Rub—
Damage liability, 544, 548
Card Room in Lodge—See Entertainment, Dancing, Billiard Room, Theatre, Amusement, Recreation
Exemption, 486
Care—
Reasonable, selection of servants, damage liability, 546
Carelessness—
Of trustees, removal, 275
Caretaker—
Occupancy, exemption, 505
Carnegie Library—Gift of, 397
Carpenter Shop — See Woodsplitting Outfit, Workshop
In hospital, 157
Of school, exemption, 495
Carriages—
Of cemetery, exemption, 520
Cash—
Construed to be covered by bonds and stock, 244
Catalogue—
Published by library under gift to buy books, 404
Catastrophies—Relief, 192
Catholics—
Charity limited to, 292
Superstitious uses, 174
Catholic Children—
Education, discretion, 262
Catholic Church — See Roman Catholic Church
As charity, 165
Superstitious uses statute, 14
Trust by Catholic, 185
Catholic Orphan Asylum—
Control of Catholic church, 185
Catholic Priest—Education, 222
Catholic Religion—
Forbidden in England, cy pres, 73
Causa Mortis Gift—
As creating charity, 153
Cemetery — See Burial, Grave, Tomb, Mausoleum, Crypt
Adornment, cy pres, 92
Amount of use necessary for exemption, 518
Attendant living on property, exemption, 518
Blast furnace, sale, 113
Burial plot, fund for, 371
Church use, cy pres, 104
Damage liability, 539
Ebb and flow of tide on land of, exemption, 519
Entire, validity of gift to, 372
Exemption, general reasons, 517
Gift to church, discretion, 259
Gift to keep donor's grave, chapel, 227
Graves, number, exemption, 518
Greenhouse, exemption, 486
No interment, termination of trust, 436n
Pennsylvania early statute, 55
Permanent improvements, exemption, 519
Personal property, exemption, 520
Platting, exemption, 518
Preliminary work, exemption, 519
Public, gift for, 218
Public, town, trustee, 335
Repair and beautifying, 222
Right to cut grass, exemption, 485
Sale of lots, exemption, 521
Separate lot, exemption, 502
Taxation, 534
Taxation, fund invested, 513
Tests for exemption, 517
Town refusal to take, 314
Cemetery Association—
Authority to take perpetual trust, 371
Cemetery Lots—
Charities by legislation, 370
Endowment, decision, 368
Central Home—
For charities, 191
Certainty—See Uncertainty
Beneficiaries, 220
Distinction as to states, 220
Purpose, beneficiary, 50
Reasonable, Kentucky, 51
Certificate—
Defectively filed, corporation, 228

(References are to pages)

Cestui que trust—See Beneficiaries
Definiteness, charities, private trusts, 235
Importance, 309
Chair—
Professor's, establishment, 204
Chancellor—
Power under statute of Elizabeth, 10
Change—Cy pres, 105
Possibility, exemption, 525
Change in Law—
Trust for, 209
Chapel—See Church
Built, perpetuity, 379
Cemetery, gift to, 227
Erection, 172
Gift, discretion, 259
Mission, 174
Sale of land, power, 111
Upkeep of services, 222
Charges—
Power to pay, effect, 273
Charitable—
Not religious, perpetuity, 330
Charitable Corporation—
Gift to, validity, 223
Charitable Gift—
Propriety, 120
Charitable Institution—
Statute of Elizabeth, construction, 531
Charitable Purposes—
Gift for, validity, 302
Charitable Society—
Plaintiff to enforce trust, 430
Charitable Trust—
Does not merely bind the conscience, 423
Permitted perpetuities, 374
Public blessings, 426
Charity—
Cannot nullify state law, 556
Commission, municipal, 434
Distinct from benevolence, 268
Instrument for scattering rather rather than gathering, 476
Irreconcilable with ordinary trust, rules, 362
Liberal construction, qualifying number of nouns, 267
Love of God and man, 286
"Never faileth," 318
Occasional exercise, mutual benefit association, 143
St. Paul's eulogy of, 130
Technical meaning, 267
Test of, perpetuity, 361
Wide and narrow meaning, 121
Charletans—
Control over, 434
Charter—See Corporation
Charitable trusts aided by, 223
Corporation, charitable purposes, 272
Rent, receipt, taxation, 508
Visitorial power, 420
Chautauqua—See Camp Association, Amusement
Exemption, 487
Use for only few days, exemption, 470
Chemistry—
Agricultural, chair for, 204
Chicago—
Stock yard fire, 142n
Chickenhouse—
Of school, exemption, 495
Children—See African Children, White Children, Colored Children, Cruelty to Children, Poor Children
Class, 296
Cruelty to, law enforcement, 141
Destitute and friendless, class, 250
Homes for, 187
Homes, payment, 156
Poor, gift to, 217
Testator, class, 301
Children's Aid Society—
Cy pres, 57
Gift to newsboy lodging house, 229
Chinese Joss House—
As charity, 166
Christ—
Cause of, gift for, 305
"Go ye and teach all nations," 171
Home, importance, 186
Memorial, Mary, 132
Christian Church—
As charity, 165
Christian Religion—
Advancement, validity, 302
Christian Science—
As charity, 165
Church, "First Members'' abolishment, effect, 115
Extension as charity, 173
Mother church, trustee, incapacity, 312
Trustee, appointment, 309
Christianity—
Charity, 122
Charity product of, 2
General advancement, 305
Girard will, 158
Religious services, charity, 164
Source of charity, 1, 14
Christianizing—By missions, 171
Christmas Presents—
Not charitable, 170
Church—See Chapel, Denomination, Religion, Religious Charities. See denominational names such as Catholic, Baptist, etc. See Dissenters, Ecclesiastics

(References are to pages)

Accumulation, Kentucky, 50
Absolute mortmain provision, 345
Application of trust to, 276
Bishop, gift for, discretion, 260
Cemetery, cy pres, 104
Cemetery gift, discretion, 259
Charity stamp on all property of, 154
Cumulative, 121
Deed to parochial school, 366
Definiteness of beneficiaries, 143
Discretion to apply to, court control, 274
Erection, charity, 168
Feeble, gift for, 298
Gift, discretion, 259
Gift to church council as gift to, 323
Gift to, cy pres, 96
Gift to, religious purpose, 252
Hospital for souls, 163
Indefiniteness of beneficiaries, 164
Land, sale, 111
Library, gift, to, 226
Material, cy pres, 107
Memorial, cy pres, 87
Mortmain, 462
Music, exemption, 533
Non-member, plaintiff to enforce trust, 430
Particular activities, 305
Particular, erection, cy pres, 96
Poor of, class, 304
Poor relief, denominational coloring, 185
Power to aid missions, 174
Power to relieve the poor, 184
Property passing to general body on dissolution, 439, 440
Removal to another village, breach of trust, 96
Sale of land, power, 111
School, charitable, 202
Selection, trustee, 306
Sequestration of fund, 425
Supper, taxation, 484
Support, cy pres, 83
Trustee for masses, 178
Trustee for poor, 328
Trustee of eleemosynary charity, 185
Two churches as beneficiaries, parties, 431
Unincorporated, gift to trustee for, 247
Unincorporated, mortmain, 358
Union, impossibility, cy pres, 96
Unwise for relief, 182
Visitorial power, 418
Weakness, effect on gift, 149

Church and State—
Separation, religious charities, 161

Church Buildings—
Discretion, validity, 266
Gift to, 222
Memorial, 131

Church Charities—
Virginia, 21, 22

Church Corporation — See Incorporation, Charter, Stock, Corporation
Gift to, beneficiaries, 330
Minister, support, 225
Other pious uses, construction, 228
Virginia, 22

Church Extension—Charity, 172

Church of England—
Propagation in Scotland, superstitious, 174

Church Purposes—
Beneficiaries defined, 143

Church Society—
Dissolution, cy pres, 98

Circulating Library, 207

Cisterns—
Waterworks, cy pres, 93

Citizen—
Plaintiff to enforce trust, 429

City—See Municipal Corporations, Town, Village, County
As trustee for charity, 328
Business functions, 213
Charitable institutions, limited to, 305
Children, poor, limited to, 296
Contribution to charity, reverter, 444
Damage liability, 538
Fountain in park, gift to, 335
Gift of hospital for, taxation, 527
Gift to, 213
Gift to poor not paupers, 217
Growth, effect, 338
Health, 213
No power to buy lot, cy pres, 89
Pension, 190
Refusal to accept hospital, 314
Religion, power to promote, 336
Removal from, lapse of charity, 402
State, mortmain provision, 352
To raise fund, condition, 375
Trustee, 190
Trustee, damage liability, 538
Trustee for library, 215
Trustee, incapacity, 312
Trustee, memorial building, 324
Trustee of charity, 333
Trustee of hospital, powers, 335
Trustee, refusal, effect, 313
Trustee, regulation, 433
University, gift to, 214

City Hospital—
Damage liability, 538

City Mission—As charity, 173, 174

(References are to pages)

Civic Center—
Arch, 216
Gate at, 216
Civilization—
By missions, 171
Expansion of charity, 122
Not a charity, 141
Civil Law—
Charity conception, 53
Cy pres, 72
Effect on English law, 4
Civil War—
Children of persons dying in, gift to, 227
Veterans, beneficiaries, exemption, 531
Clark, John—
First charitable donor in America, 48
Class—
Certainty, members uncertain, 287
Civil war veterans, 531
Denominational lines, 472
Designation, necessity, 283
Difficulty, what class sufficient, 286
Gift to, direct, 221, 318, 563
In foreign state, 447, 448
Large, no trustee, gift direct to, 302
Legality, 288
Mathematical certainty unnecessary, 287
Must be cover whole world, 451
Selection, Louisiana, 53
Selection out of, 280
Size, 288
Small, large gift, 290
Smallness of, no objection, purely public, 472
Taxpayers as, 212
Wealthy as, 135
Class of Charities—
Distinction, 157
Classroom—Exemption, 495
Classification—
Absurdity, 291
Basis, 308
Foreign charities, exemption, 527
Clergymen—See Church, Minister, Parsonage, Pastor, Priest, Preacher
Gift for, salary insufficient, 298
Person to be educated as, selection, 306
Superannuated, class, tobacco excluded, 291
Support, charity, 169
Support, gift to, 219
Support, power of town, cy pres, 102, 103
Trustees, effect, 185
Underpaid, gift to, 227
Clergy Society, 191
Clock—
Repair, not charity, 141
Clothing—
Education, poor children, 109
Purchase, poor scholars, 217
Supply, education, 205
Club—See Amusement, Entertainment, Recreation
Catholic woman's, taxation, 499
Charity, recreation, 155
For boarding students, exemption, 506
Workingmen, library, 207
Clubhouse—Taxation, school, 495
Clubroom—
Business men's, coupled with library, 334
Gift to, 213
Lodges, exemption, 516
Coal Distribution—
At low cost, city trustee, 217
Codicil—
Mortmain, increasing gift, residue, 352
Never executed, special intent, 87
Coeducation—
Female academy, cy pres, 109
Successor, cy pres, 98
Coke, Lord—Charity dictum, 3
College — See University, School, Education
Benefits society generally, 203
Church control, charitable character, 202
Dwelling house, lease, taxation, 507
Gift to, 226
House, leased, taxation, 513
Land two miles away, taxation, 500
Literary fund, 205
Meaning, 494
Mortmain, 358
Name perpetuation, cy pres, 92
Payment by student, 156
President, gift for masses, 180
Trustee for masses, 178
Colorado—
Condition precedent, 444
Executory devise, 232
Legal development, 61
Liberal construction, 467
Masonic hall, exemption, 522
Colored—See Negroes
Children, class, 305
Children, discretion, 262
Children, industrial home, cy pres, 107
Children, school district, cy pres, 83
Clergymen, school, race prejudice, sale, 112
People of South, class, 305

(References are to pages)

People, park for, city appointed trustee, 314
People, trust to, 276
Colored Persons—Education, 222
Colored Race—Improvement, 192
Colporteur—
Baptist publication society, 41
Columns—Parks, gift to, 216
Comity—
Foreign corporation, no greater privilege than domestic, 454
Commemoration—
Charity, effect, 131
Commercial Purposes—
Lease, exemption, 508
Commercial School—
Discretion, validity, 265
Commercial Uses—
Exemption, 533
Commission—
Salary on basis of, exemption, 478
Substituted for city council as trustee, 336
Supervision, 433
Committal—
Patient, damage liability, 548
Committeemen—
Trustees, 247
Common Disaster—
Mortmain statute, 356
Common School — See School, Education
Favored, construction, 203
Gift to, 214
Commons—
Gift for, 216
Communistic Society—
As charity, 165
Clause in covenant, 154
Community—
Religious, member, donee, 142
Compensation—
Voluntary services, trustees, 324
Compromise—See Settlement
Charity, exemption, 525
Tilden gift saved by, 37
Validity, attorney general, 431
Concerts—See Amusement, Entertainment, Recreation
Creating charity, 153
Condemnation—
Condition against sale, cy pres, 113
Condition—See Reverter
Against sale, express, effect, 112
Erection of library, 215
Express, that donee devise, 274
Fund to be raised, 375
Gift on, that it must not lower tax rate, 214
Gift on, to two churches, 431
Implied, Louisiana, 53
Impossible or illegal, Louisiana, 445
Incumbrance, grantor receiving full consideration, 446
Infrequent, 436
Interpolated, elimination, 425
Liberal construction, 441
Limit to one of corporate purposes, 226
Of additional funds, cy pres, 92
Power of donor to make, 440
Precedent, cy pres, 102
Refusal of trustee to accept on account of, 314
Reversion, law suit, construction, 394
Reverter, 57
Subscription of additional fund, 381
Subsequent, cy pres, 103
Subsequent, tomb, repair, 371
Subsequent, void, 445
Subsidiary, cy pres, 102
Tax not to be lowered, 214
That city contribute a like sum, 245
Tomb, repair, 371
Uncertain event, perpetuity, 377
Validity, conflict of law, 452
Conditional Limitation—
Gift to non-existing corporation, 229
Confederate Soldier—
Gift for, perpetuity, 378
Relief by charity, 458
Conference—
Methodist Episcopal, selection of beneficiaries, 281
Conflict of Law—See Foreign Corporations
Practical difficulties, 448
Tilden Act, 36
Congregation—
Devise to, not gift to ministers, 398
Congregational—
Unitarian, charity, 169
Congregationalist—
Charity limited to, 292
Conjunctive—
Effect, 271
Connecticut—
Ancient statute, exemption, 457
Bank stock, subscription, favor to charity, 417
Bequest to Montana bishop, 449
Building does not cover vegetable garden, 498
Cemetery of religious society, 371
Class must be designated, 284
Cy pres, 80
Division, fund, power, trustees, 281, 282
Legal development, 47
New York statute of wills, effect, 455

(References are to pages)

Respondeat superior, damage liability, 549
Statute of Elizabeth, reason, 13
Conscience—
Trust merely binding on, 423
Consent—
Tacid, secret trust, mortmain, 354
Consideration—
Charitable gift, 150
Excludes charity, 152n
For contact by special charter for exemption, 469
For deed, exclude charity, 152
Grantor, charity, 418
Consistory—
Gift to, given to corporation, 228
Consolidation—
Corporation, cy pres, 97
Constitution—
Massachusetts, charity, liberal construction, 387
Use of constitutional words in creating charity, 401
Constitutional Limitation—
Exemption, construction, 464
Construction—See Liberal Construction
Connecticut statute, 47
Constitutional limitation, exemption, 464
Exemption, statute, strict, 460
Kentucky statute, 50
Liberal, cy pres, 77
Liberal, Maryland, 27
Liberal, of statute of Elizabeth, 126
Michigan Tilden Act, 39
Not influenced by opinion of founder, 470
Of instrument, attorney general, 429
Statutes, exemption, 533
Statute of Elizabeth, 4, 11
Tilden Act, 35, 36
Consumptive Home—
As almshouse, exemption, 526
Contagious Ward—
Hospital, discretion, 264
Contingency—
Liberal construction, 376
Not happened, mortmain, 357
Contingent—
Gift, charity, perpetuity, 378
Contract—See Agreement
Charities, enforcement, 540
For exemption, by special charter, 468
For masses, validity, 178
Impairment, obligation, cy pres, 117
Contrariety—
Trustee, effect, 280
Contributions—
Charity created by, 153
Interest of subscribers, 439
Religious society dependent on, 164
State, mortgage foreclosure, 160
Contributors—
Also beneficiaries, visitorial power, 421
Control—Charity, cy pres, 92
Convenience—Cy pres, 105
Convent—See Monastery, Nuns
Building as charity, 169
Exemption, residence by nuns, 493
Farm, exemption, 498
Conversion—
Foreign corporation, mortmain, 453
Real and personal property, power, 449
Real into personal property, cy pres, 110
State may authorize, cy pres, 117
Conveyance by One Charity to Another—
Does not create charity, 150
Cooper, Judge Fennimore—
Chicago stock yards fire, 142n
Cooperative Store—See Store
School, taxation, 495
Cornell University—
Agricultural student, eye lost by explosion, damage liability, 551
Corporate Property—
Exemption, extent, 490
Corporation — See Incorporation, Stock, Charter, Church Corporation, Special Charter
Absolute gift, 33
Appointment of trustee by, reference to corporate office, 322
Burial plots, perpetual fund, 371
Capacity to take, future estate, 231
Capacity to take limited, variety, 343
Cemetery, authority to take trust for grave, 371
Charitable, gift defined, within powers, 222
Charitable, not public, 329
Charitable, what is, 330
Control, by stockholders, charity, 224
Creation, power, trust, 279
Cy pres, 85
Cy pres, change or extinction, 96
Discretion to select, 264
Dissolution, distribution, assets, 332
Dissolution, effect on gift, 97
Enlargement of capacity, 231
Enlargement of powers, effect, 232

(References are to pages)

Existence, at time of gift, 229
Existing, gift to, 26
Expressly authorized, 346
Foreign, taxation, 534
Formation, executory devise, 231
Formed after donor's death, trustee, 326
Future, exemption, 526
Gift absolute in form, construction, 330
Gift beyond power, appointment of new trustee, 313
Gift to, absolute, 224, 234
Gift to, suggestion, 561
Hospital, commercial, 188
In trust, meaning, 225
Misdescription, 406
Mortmain, trustees, successor, 358
Not a prerequisite for exemption, 459
Officers, visitorial power, 420
Organization in rebellious state, power to take, 327
Organized, perpetuity, 379
Perpetuities, 224, 365
Public, gift beyond power, 222
Purpose beyond corporate power, 222
Quasi trust, 328
Stock, charity, 331
Technical trustee, 328
That it may cease to exist immaterial, 327
To be formed, validity of gift to, Maryland, 26
Transfer to state, cy pres, 98
Trust to be consistent with its purposes, 328
Trustee, attorney general not necessary party, 428
Trustee for another, 328
Trustee, incapacity, 312
Trustee, Louisiana, 53

Costs—
Allowance, 432
Power to pay, effect, 273
Relator liable for, 429

Cotton Press—
Exemption, 488

County—See Municipal Corporation, City, Town, Village
Children, poor, limited by, 296
Damage liability, 537
Exemption, 526
Gift to for school, 213
Orphans, class, 305
Sale of bank stock, inability to hold, 113
Treasurer, charity held by, 322
Trustee, incapacity, 312
Trustee, inference, 320

Court—
Cannot act on own motion, visitorial power, 426
Discretion, judicial function, 277
Discretion vested in, 276
Interference with trustee, reasons for, 276
Limitation of visitorial power, 425
Power in appointing trustees, 321
Sale of charity property, marketable title, 115
Supervision, 283
Trustee appointed by, discretion, 261
Trustee, appointment, 279
Trustee, discretion, 274
Visitorial power, appeal from visitors, 423
Visitorial power, no visitors in existence, 424

Court Action—Trustees, 307

Courthouse—Gift to, 218

Covenant—
Mortgage, taxation, exemption, 458

Creditors—
Justice to, restriction, 233
Rights, mortmain, 359

Cruelty to Animals, 193—
League for, charitable nature, exemption, 532

Cruelty to Children—See Children Law enforcement, 141

Crypts—See Mausoleum
In mausoleum, exemption, 520

Custodian—
Cemetery, exemption of land occupied by, 519

Custom—
Of ordinary, 15
Reference to, definiteness, 242

Cy Pres—See American Cy Pres Doctrine, English Cy Pres Doctrine, Prerogative Power, Royal Prerogative
Adequacy of gift, 150
Agreement, sanction by court, 106
Alabama, 80
Alternative provision, 100
Approximation, 82
Attorney general as party, 429
Called dangerous doctrine, 327
City no power to buy lot, 89
Connecticut, 80
Dedication, school, 108
Discretion, non-charitable purpose, 78
Education, payment for light, heat, etc., 78
Escheat not as extensive as, 103
Escheat, Pennsylvania, 56
Expressly directed by donor, 94, 562
Flexibility, 90
Forfeiture clause, 84
Fraud, 90

(References are to pages)

Georgia, 80
Georgia statute, 51
In personam, in rem, 76
Intention, ascertainment, 77
Investment, stock, bonds, 91
Jesuba, 73
Judicial power, America, 76
Kentucky, 80
Maryland, 79
Memory preservation, 71
Middle ages, 71
Minnesota, 79
Mississippi, 79
Mormon fund, 322
New Hampshire, 82
New trustees appointed, 322
New York, 79
No reverter, 438
No trustee appointed, 318
North Carolina, 80
Parens patriae, 75
Pennsylvania, 57, 81
Prerogative, America, 239
Reason for, 81
Recommendation, society for amendments to law, 81
Refusal of trustee to accept condition, 314
Roman law, 71
Royal prerogative, 72
Royal prerogative, America, 75
School district, division, 83
Sign manual, 72
South Carolina, 80
Superstition of middle ages, effect, 71
Tennessee, 80
Tilden Act, 35, 37, 79
Trustee presupposed, 76
Valid approximation, 83
Virginia, 79
West Virginia, 79
Whole fund instead only income transmitted to England, 452
Wisconsin, 79

Cy Pres Doctrine—
Pennsylvania situation, 56, 57
Reverter clause, 57

Dairy Farm — See Agricultural, Farm, Garden, Greenhouse
Exempt as part of agricultural school, 497

Damage Liability—
English cases, 536

Dance Hall—Gift for, 210

Dance Room—
In lodge, exemption, 486

Dancing—210. See amusement, Billiard Room, Entertainment, Recreation, Theatre

Day School—Religious, 170

Deacons—
Managers of Charity, 281

Deaf—205

Deaf and Dumb—Asylums, 191

Deaf Children—Home, sale, 112

Death—
Trustees, appointment, 280
Trustee, effect, 316

Deathbed Gifts—Mortmain, 350

Death Statute—
Inapplicable to charities, 544

Debt—
State or United States, gift to, 219

Debtor—
Just before generous, mortmain, 359

Declaration of Trust—
As creating charity, 153

Decoration—
School grounds, taxation, 514

Dedication—See Sale
Ambulatory, exemption, 504
Charity, 152
Gift of land, distinction, cy pres, 109, 110
Perpetuity, 374
School, cy pres, 108
To cemetery, exemption, 517
To charitable uses, validity, trustees, 319
Virginia, 22
Wages, railroad hospital, damage liability, 554

Deeds—
Cy pres, Connecticut, 80
Delivery, charity, 153
To charity, 152
Virginia, 22

De Factor Corporation—
Liberal construction, 228

Definiteness—See Indefiniteness
Beneficiaries, Maryland, 26
Beneficiaries, Wisconsin, 41
Diversity among states, 220
Purpose, Tilden Act, 36
Religious gift, denomination, 167
Sufficient if any charity excluded, 290, 291

Definition—
California, 140
Camden's, 134
Donat, 139
Gray's, 136
Louisiana, 139
Missouri, 140
Of charity, 123
Of charity, difficulty, 121
Perry, 139
Pomeroy, 139
Rhode Island, 139
Swayne, 139
Taxes and assessments, 458

Defunct Corporation—
Gift to, cy pres, 96

Delaware—
Construction purely public charity, 471
Court discretion, 377
Legal development, 64

(References are to pages)

Delay—See Abuse
By trustees, court interference, 276
Home, establishment, reverter, 442
Indefinite, fatal, 376
Deliberation—Mortmain, 350
Delinquents—
Home of, farm for work, taxation, 500
Delivery—Of charitable gift, 151
Delivery of Deeds—
As creating charity, 153
Denomination—See Church, Religion
Book store or publishing house, exemption, 489
Poor relief by church, 185
Transfer of property from one to other, 167
Denominational College—
Charitable character, 203
Denominational Connection—
Donor, evidence, 167
Denominational Control—
Change, cy pres, 84
Purely public charity, 472
Denominational Molds—
Significance of, 166
Denominational Purposes—
Municipal corporation, 334
Denominational School — See Parochial School
Payment by scholars, 156
Department—City, gift for, 213
Descendants—
Beneficiaries limited to, 321
Class, 300
Description—
Of charity, sufficiency, 411
Of Trustees, 247
Deserted Women—
Classification, 294
Deserving—
Discretion, validity, 266
Deserving Poor—
Bequest to, validity, 318
Destroyed Building—
Exemption, 505
Destruction
Legal tender notes, 132
Of religion, effect, 158
Public policy, 147
Details—
Administrative, liberty in, 258
Trustees, discretion, 306
Deuteronomy—
Ch. 15 v. 7-9,—2
Ch. 23 v. 19, 20,—2
Ch. 24 v. 13, 17, 19, 20, 21,—2
Devise—See Bequest
Unincorporated society, 250
Virginia, 22
Devisees—
Residuary, visitorial power, 422
Devoted—Taxation, 485
Dickens, Charles—
United Metropolitan, etc., 210
Dicta—
Statute of Elizabeth, influence, 11
Dimunition—Cy pres, 106
Dining Hall—
College, exemption, 506
School, taxation, 495
Dining Room—
School, exemption, 495
Diocese—See Bishop
Bishop, trustee, 303
Charitable, purposes of, 305
Division, effect, 338
Diphtheria—
Nurse, damage liability, 556
Directions—
Discretion, trustees, 263
Trusts as, Louisiana, 53
Directors—
Board of, visitors as counterpart, 419
Disbursements—
Tuition in excess of, 479
Disclaimer—
Except fund derived from pay patients, damage liability, 547
Discovery—
Scientific, abstract, discretion, validity, 265
Discretion—
Absolute, legality of gift, 304
Administrative details, 258
Class, New York, 284
Division, fund, trustees, 281, 282
Executor, time, notice, 366
Executory devise, 231
Limits of, 282, 562
Non-charitable objects, 301
Non-charitable purpose, 264
Non-charitable purpose, cy pres, 78
Personal almoner, 278
Prerogative, cy pres, 72
Selection, Louisiana, 52, 53
Trustee, indefinite class, 302, 303
Trustees, Tilden will, 34
Trustee, varied, 309
Vestry, charity, 164
Disestablishment—See Church
Religion, cy pres, 74
Disjunctive—
Use of, 271
Use of, significance, 271
Dispensary—
Commercial medical college taxation, 480
Gift void, 240
Medical free, gift for, 282
Dispensation—
Postponement, perpetuity, 376
Dissenters—See Church
Superstitious uses, 174

(References are to pages)

Dissolution—
Charitable corporation, distribution, assets, 332
Distributable Estate—
Mortmain, 356
Distributing Library, 207
Distribution—
Among members, 436
Among members of lodge, 145
Assets among members, 332
Entire, gift a charity, 143
District of Columbia—
Charity situation, 20
Class must be designated, 284
Legal development, 27
United States Supreme Court decision, influence, 246
Disused Building—Exemption, 505
Diversion—
Trust funds, agreement, arbitration, settlement, 431
Dividends—
No provision for, fire patrol, 195
Division—
Diocese, effect, 338
Fund, power trustees, 281, 282
Of funds realized by sale, 112
Municipal corporation, effect, 337
Property, members, 194
Dixon—
Influence on Wisconsin development, 40
Document—
Opinion of draftsman, 12
Doles—Unwisdom of, 182
Domestic Arts, 205
Domestic Corporation—
Exemption limited to, 460
Domicile—
Gift of personal property void by, void everywhere, 450
Personal property, 449
Validity of gift, mortmain, 453
Dominant Purpose—
Payment as test of exemption, 480
Donat—
Louisiana charity definition, 139
Donations—
Charity created by, 153
Numerous, visitorial power, 420
Power of trustee to make, 153
Dormitory—See College, University, School, Y. M. C. A., Greek Letter Fraternity, Fraternity House, Sleeping Room
College, exemption, 506
Distant from campus, taxation, 483
Of school, exemption, 495
Pay, taxation, 483
Residence of teacher, exemption, 490
Dowry—Young ladies, 54
Drill Rooms—
Military school, exemption, 495
Drinking Fountain—See Fountain
For horses, parks, 216
Memorial, charity, 133
Dues—
Charity, lodge, 145
Inconsistent with charity, 143
Dumb, 205
Duties—Of trustees, 323
Dwelling—See House
Leased to school, exemption, 507
Of custodian of cemetery, exemption, 519
Ease—
Gifts in, 413
In, fire patrol, 195
Ecclesiastics—See Church
Direction by, forbidden, 404
Ecclesiastical Elements—
Modifying Roman law, 4
Education—See College, School, University, Parochial School, Public School, Medical School
A true charity, 198
Art, 208
Art museum, 525
Board of, gift to, 213
Broad aims, 200
By missions, 171
Catholic priest, 222
Colored person, 222
Cy pres, 78
Definition, 532
Elementary, advanced, cy pres, 109
Females, 284
For ministry, 170
Free schools outside of public school system, 201
Generally, as charity, 201
Gift, void, 240
Grandnephew, cy pres, 93
Importance, 199
Liberal policy of exemption, 514
Minister, non-Baptist teacher, discretion, 263
Ministry, relative of donor, 299
Municipal corporation, 334
Need not be confined to poor, 296
Negroes, change in public policy, 147, 148
Orphans, 217
Poor Catholic children, discretion, 262
Poor children, trustee appointed, 319
Poor need not be mentioned, 214
Preference, poor, 299
Public schools, 201
Religious, 170
Religious adjuncts, 200
Rich and poor, beneficiaries, 199

(References are to pages)

Use for benevolence or religion perversion, 158
Virginia recognition, 23
Educational Charity—
Aim, founder's religious opinion, 158
Distinct from religious charities, 161
State control, development, 161
Statute of Elizabeth, 125
Educational Objects—
Tilden will, 34
Egotism—Motive for charity, 131
Ejectment—
Power of successor to trustee to bring, 321
Visitorial power, 425, 426
Eldon, Lord—
Approves Grant's definition, 124
Cy pres doctrine, 74
Elementary Education—
Advanced education, cy pres, 109
Eleemosynary Charity, 272—
Distinct from religious charities, 161
State control, development, 161
Statute of Elizabeth, 125
Founder's religious opinion, 158
Eleemosynary Needs—
Virginia, 23
Elements—Catastrophies, 192
Elevator Operator—
Negligence, damage liability, 541
Emancipation — See Slaves, Negroes
Slaves, gift, 45, 190
Embellishment—
Park, taxation, 462
Emigrants—
St. Louis, class, 297, 298
To settle in West, St. Louis, 335
Eminent Domain—
Charity land may be taken by, 329
Charity property, cy pres, 110
Condition against sale, cy pres, 113
Power of charitable corporation, 329
Employee—
Damage liability, 556
Favored, benefit, taxation, 479
Payment, power of trustees, 325
Quarters, school, taxation, 495
Endowment—See Fund
Exemption, legislative action, 513
Exemption without express mention, 512
Girls, gift to, 190, 335
Investment, exemption, school, 511
Investment in bonds, mortgages, land, etc., 513
Professorship, seminary, 225
Research colonial history, 208
Endowment Fund—See Fund, Improvement Fund
Contribution, cy pres, 99
Education, 204
House leased, taxation, 513
Lack of, effect, 150
Merger, cy pres, 98
Taxation, 534
Enema—
Hot water, damage liability, 546
Engineering—Naval, 205
England—
Cases on damage liability, 536
General history before. statute of Elizabeth, 12
License, mortmain, 346
Mortmain, history, 341
Record commission, 6
English Charity Doctrine—
General trend toward, 234
Gift to cemetery, 373
English Charity Law—
Applicable to America, 9
English Charity Rule—
Division of states, 20
English Cy Pres Doctrine—See Cy Pres Doctrine, American Cy Pres Doctrine, Prerogative Power, Royal Prerogative, Sign Manual
Bases originally on reason, 72
Inconsistent with American governmental conditions, 73
Not in force in America, 73
Not judicial, 72
Reductio ad absurdum, 73
English Mortmain Statutes—
Not in force in America, 342
English View—
Religious services, 164
English Statutes—
Adoption, 58
Henry VIII, Chapter 10, 245
Maryland, 25
Mississippi, 46
Repeal in America, 4
Wisconsin, 40
Entertainment — See Amusement, Recreation, Theatre, Dancing, Billiard Room, Card Room, Club, Concert, Park, Pleasure, Playground, Summer Home
Charity, 131
Lodge, discretion, 266
School, damage liability to paying visitor, 544
Visitorial power, 420
Entrance Fee—
By beneficiaries, exemption, 531
Epileptics—Homes, payment, 157
Episcopal Church—
As charity, 165
Virginia transfer of property of, 21

(References are to pages)

Equitable Conversion—
Wisconsin doctrine, 41
Equity—
Control over charities, 364
Erection—
Particular church, other church, repair, 96
Escheat—
Cy pres, Pennsylvania, 56
Cy pres not as extensive as, 103
Mortmain, excess, no heirs, 348
Public to take where charity dissolves, 444
Eschweiler—
Dissent in recent Wisconsin case, 42
Established—
Library, gift to, not applied to existing library, 397
Establishment—
Church, Virginia, 23
Established Church—
Gift to, validity, 334
Established Religion—
Result of, 176, 177
Estoppel—
By non-taxation and improvement of land, 459
Etc.—Meaning, charity, 272
Eucharist—Masses celebrate, 177
European Situation—
Charity solution, 3
Evidence—
Denominational connection of donor, 167
Exceeding—Not construction, 259
Exclusively—
Used for charitable purposes, 473
Exclusively Used—
Profit, Kentucky rule, 475
Executive Officer—
Endowment, university, 204
Execution—Of gift to charity, 150
Executor—
As trustees, 319, 320, 326
Charity, bond, 325
Discharge, receipt by unincorporated society, 250
Two or more, abuse, 13
Executory—
Gift, charity, perpetuity, 378
Executory Devise—
Charity by, 33
Charity by, may be created in all states, 232
City, capacity to take, 232
Corporation to be formed, 33
Formation of corporation, 231
Maryland, 26
Exempted by Law—
Meaning, 526, 528
Exemption—See Taxation, Assessment, Inheritance Tax
Ancient statute, 457
Appropriation of public funds, 460
By statute, need not be by charter, 530
Connecticut ancient statute, 457
Does not cover assessment, 458
From general tax, inheritance tax, 523
Lodges, taxation, inheritance tax, 144
Not confined to charities, 457
Of charity, reason, 524
Religious charities, 457
State aid, 525
Tax, temperance union, charity, 192
Without express statute, 466
Exception—
Of certain persons from charity, public policy, 446
Exodus—Ch. 22 v. 22, 26, 27,—2
Exercise—
Farm, taxation of school, 497
Existence—
Donee not in, Tilden Act, 36
Expediency—Cy pres, 104
Expense of Administration—
Effect, 146
Explanations—
Discretion, trustees, 262
Express Condition—
Construed as trust, 441
That donee devise, 274
Expressly Authorized—
New York provision, 345, 454
Extinct Corporation—
Gift to, cy pres, 96
Extinction—
Of society, termination of charitable trust, 435
Extension—Church, 172
Extravagance—
Trustee, court interference, 276
Ezikiah—Ch. 18 v. 8,—2
Factory—
Damage liability, hospital, 541
Fads—
Exclusion from school, 206
Failure—
Trustee, court interference, 275
Trustee, effect, 314
Fair—
Armory, 485n
As creating charity, 153
Visitorial power, 420
Fair Association—
Damage liability, 539
Faith Cure—
Christian Science, 165
Family—
Jewish, poor, class, 290
Family Settlement—
Distinguished from charity, 132
Family Worship—
In dwelling, exemption, 516

(References are to pages)

Farm — See Agricultural, Dairy Farm, Garden, Greenhouse
Acquired by school, taxation, 495
Building and ground actually covered exempted, effect, 461
Exempt as part of agricultural school, 496
House of refuge, taxation, 478
Leased, exemption, 508
Of convent, taxation, 498
Small gift, cy pres, 84
University, taxation, 478
Farming—
Of cemetery land by attendant, exemption, 518
Favor—
Charities, 389
Legislative, to charities, 417
Federal Courts—
Charity rule in, 68
Damage liability, 558
Fees — See Payment, Tuition, Work
Charity, lodge, 145
Settlement work, 155
Females—See Women
As class, 284
Female Academy—
Cy pres, both sexes, 109
Female Department—
School, gift to, 227
Fence—
Enclosure, exemption, 504
Separating property, exemption, 502
Surrounding separate property, exemption, 501
Fencing Land—
As making gift certain, 243
Fidei Commissa—
Louisiana law, 52, 306
Fine Arts—See Arts, Studios
Academy, exemption, 462
Institute of, 208
Professorship, 204
Fire—Voluntary companies, 194
Fire Baptist Holiness—
As charity, 165
Fire Company—
Cy pres, 86
Dissolution, cy pres, 98
Gift to, 218
Voluntary, 194
Fire Department—
Gift to, 213
Relief association, 194
Fire Patrols, 195—
Damage liability, 539
Fire Truck—Cy pres, bill, 95
Fishermen—
Widows and orphans of, 262
Widows and orphans of, gift to, 335
Flag—
United States, 209
United States, discretion, 260
Flexibility—Cy pres, 90
Florida—Legal development, 61
Food—
Education, poor children, 109
Foolish—Gifts, effect, 149
Football Field—Exemption, 496
Foreclosure—
Mortgage, charity, property, 160
Foreign—Missionary work, 57
Foreign Beneficiaries—
Louisiana, generally, 447
Foreign Charities—
Exemption, 527
Foreign Corporation — See Conflict of Laws
Country, limitation, 454
Devise of West Virginia land, 451
Exemption, 528, 529
Exemption extended to, 460
Exemption from inheritance tax, 530
Filing of certificate, municipal, 447
Inheritance tax, exemption, 528, 529
Inheritance tax, test, 529
Mortmain statute, exemption, 453
Mortmain, validity, 453
Taxation, 534
Trustee, 312
Foreign Lands—
Gospel, propagation, 222
Foreign Missions—
Charity, 172
Gift to church, in trust, 402
Foreign State—
Personal property, New York rule, 450
Validity, Tilden Act, 36
Forfeiture—
Not favored, condition, 442
Not fitting remedy, 438
Forfeiture Clause—
Cy pres, 84
Specific intent, cy pres, 84
Formalities—Discretion, 280
Forms—Suggestions, 564
Foundatio incipiens—
Definition, 418
Foundatio perficiens—
Definition, 418
Founder—
Of charity, visitorial power, 420
Foundlings—Class, 290
Foundling Asylum—
Gift to treasurer of, 229
Foundling Hospital—See Orphan Asylum
As charity, 191
Gift to, 335
Jesuba case, 73

Fountain, 216 — See Drinking Fountain
Charity, 133
Memorial, effect, 132
Park, gift to city, 335
Fountain for Horses, 193—
Charity, exemption, 531
Fourteenth Amendment—
Gift to white race, 294
France—Service to, 532
Franklin, Benjamin—
Accumulation for two hundred years, 365, 383
Artificer, gift to, 195
Founder of American Philosophical Society, 466
Founder of Philadelphia Library Association, 472
Gift to Boston and Philadelphia, 218
Gift to municipality, 335
Testamentary charity, 190
Will, 195
Will, selectment, substitution, 337
Will, trustees, leading clergymen, 323
Fraternal—Lodge, charity, 145
Fraternal Order—
Club house, exemption, 516
Fraternity—
Exemption, 462
Lodge, taxation, 522
Fraternity House—
Exemption, 516
Private boarding house, 516
Taxation, 495
Fraud—
Court interference, 27
Cy pres, 90
Secret trust, mortmain, 354
Trustee, court interference, 276
Free Bed—See Bed
Cy pres, 85
Hospital, liberal construction, 402
Free School—
Sufficiency of designation, 401
Free Service—Pay charged, 154
Free Thinkers—Gift to, 159
Freedman—Gift to, 294
Freedom—
Gift to Boston investigator, 159
Fresh Air Fund, 191
Friends—
Hospice for traveling, cy pres, 95
Friendship—Liberal league, 210
Fuel—
Discretion as to, 260
Provision for, taxation, 531
Fugitive Slaves — See Slaves, Slavery Emancipation
Cy pres, 85
Provision for, construction, 400
Fugitive Slave Law—
Trust to assist slaves under, 147
Fund—See Accumulation, Endowment Fund, Improvement Fund
Abuse, effect, 146
Acceptance, condition precedent, 443
Charge on for keeping grave in repair, 371
Consumption of, 435
Discretion, limits, selection of beneficiaries, 263
Division, discretion, trustees, 281, 282
Endowment, education, 204
Endowment, exemption, 512
Endowment, taxation, 534
Entire distribution, 143
Exhaust, power, 259
Franklin, Benjamin, 190
From sale, division between charities, 112
Institution, exemption, 531
Institution of charity, 475
Investment in land, taxation, 503
Lack of, effect, 150
Lack of, termination of trust, 435
Land be placed in, power to sell, 111
Literary, college, 205
Masonic, charity, exemption, 531
Of cemetery, exemption, personal property, 520
Portion of, ascertained, given to void purpose, 243
Profit, railroad hospital, charitable character, 554
Raising of not obligation of trustee, 150
Separate, name, 134
Stock, investment, cemetery, taxation, 513
Striking workers, 191
Town, discretion, 266
Upkeep of grave, 368
Funeral—See Cemetery, Burial
Provision for, 368
Funeral Chapel—
On cemetery, exemption, 519
Furrow—
Separation by, taxation, 502
Future Estate—
Charitable gift, 230
Incorporation, effect, 231
Unincorporated society, incorporation, 254
Garage—
Of school, exemption, 495
Garden — See Farm, Agricultural, Vegetable Garden
Botanical, 207
Exemption, 497
House of refuge, taxation, 478

(References are to pages)

Not covered by hospital exemption, 461
Not covered by word building, 498
Use by sexton of cemetery as, exemption, 519
Use of small plot of school, exemption, 486

Gas House—
Of school, exemption, 495
Municipal, 213

Gate, ornamental—
Civic center, 132, 216

General Church—
Local church, cy pres, 96

General Intent—
Almoner, trustee, 115

General Intention—See Intention, Special Intent
Cy pres, 76, 86, 92
Determination, cy pres, 94
Memorial, cy pres, 88
Must be expressed, 95
Practical suggestion for expression of, 562
Religious charities, 95

General Purpose—
Lodge, discretion, validity, 266

General Slocum Disaster—
Subscription, not charity, 141

Generosity—
Definition, district from charity, 268

Geographic Society—See Historical Society
Charitable character, 208, 209

Geographical Boundaries—
Validity, 451

Geographical Error—
In description, effect, 416

Geography—
Class of beneficiaries, 289, 305

George, Henry—
Circulation of works, 209

George the Second—
Mortmain Statute, American copy, 350

Georgia—
Autopsy, unauthorized, damage liability, 548
Cross currents, 69n
Cy pres, 80
Incidental use of charity for profit, exemption, 484
Legal development, 51
Mausoleum, exemption, 520
Stock corporation, exemption, 515
Whole fund instead of income transmitted to England, 452

German—Charities, 267

Germane—
Gift to municipality for the poor, 217
Municipal corporation, 334

Gift Inter Vivos—
Maryland rule, 27
Must be executed, 150

Girard, Stephen—Will case, 6

Girard Will Case—
Daniel Webster, 149

Girls—See Wayward Girls, Working Girls
Endowment, gift to, 335

Girls School—
Discretion in trustees, 258

Gladstone—
Criticism of charities, 131

God—
Cause of promotion, void, 240

Good Affections—Charity, 122

Gopher Guns—
University campus, damage liability, 541

Gospel—See Religious Charity
Connecticut, 47
Dissemination, home and abroad, 305
Foreign lands, propagation, 222
Poor, preaching of to, 240
Preaching, colored people, 262

Gospel Truth—
Gift for validity, 240

Governmental Function—
Execution, charity, 212

Governor—
Trustee appointed by, 323

Granary—
Of school, exemption, 495

Grand Nephew—See Nephew
Education, cy pres, 93

Grant—
By township or United States as creating charity, 153
Construction, Connecticut statute, 47
Tilden Act construed as power, 37

Grant, William—
Definition of charity, 124

Grass—
Right to cut, exemption of cemetery, 485

Grave — See Cemetery, Burial, Tomb
Gift to keep donor's, 227
Keep in order, foreign corporation, exemption, 528
Right to, 372
Taxation, 518
Upkeep, 368

Grave Yard—
Park, cy pres, 104

Gray, Horace—
Definition, 136

Greenhouse — See Farm, Dairy Farm, Agricultural, Garden
Cemetery, exemption, 486, 519
School, exemption, 495

(References are to pages)

Greek Letter Fraternity — See Fraternity House, Dormitory
House, exemption, 516
"Grounds"—
Of University, construction, 404
Grove—
Used by school for recreation, exemption, 496
Growth—Of city, effect, 338
Gymnasium—
Of school, exemption, 495, 496
Taxation, 514
Hampton Institute—
Dairy farm, taxation, 497
Handicraft—
Teaching, 205
Happiness of Man—
Aim of charity, 121
Hardwick, Lord—
Jesuba case, 73
Religious houses, possession of property, 362
Harvard—
Exemption of separate houses, 493
Property outside of Cambridge, exemption, 500
Hastings—
Reasons for William's success, 15
Health—
City, inhabitants, 213
Park, amusement, 215
Sexual organs, 205
Health Resort—
For profit, exemption, 499
Payment, 157
Heathenism—
Devoid of charity, 1
Hebrew Societies — See Jewish Religion
Central home, charity, exemption, 531
Heirs—
As trustees, 319
Costs, 432
Incapacity as trustees, 312
Needy, class, 300
Plaintiff to enforce trust, 430
Possession of charitable property, 317
Sufficiency of gift, cy pres, 106
Visitorial power, 421, 422
Held—
By charity, construction, 472
Henry George—
Works, circulation, 209
Hernia, Inguinal—
Operation on wrong side, 548
High School—See School, College, University, Education
Charity, 203
Gift to, 214
Highway—
Gift to, 218
Separation property, taxation, 501
Historical Society — See Geographical Society
Colonial history, 208
Exemption, 532
History—Colonial, research, 208
Home — See Soldiers Home, Orphan Home, Maternity Home
Aged infirm mechanics, 305
Central, Hebrew societies, charity, exemption, 191, 531
Children, 186, 187
Christ's saying, 186
Confined to lodge members, 187
Endowment of room, cy pres, 104
Establishment, discretion, 262
For missionaries, 172
Gift on condition of supporting certain person, 442
Girls, gift to, 227
Industrial, cy pres, 107
Lodgers or roomers, exemption, 506
Maintained by state, gift to, 217
Masonic, exemption, 522, 523
Maternity, 187
Old people, cy pres, 107
Old persons, 186
Orphans, 186
Payment by inmates, 156
Poor children, municipal corporation, 334
Preference, 299
Sailors, 186
Summer, taxation, 499
To be built, condition, 441
Widows, 186
Working girls, 186, 187, 295
Working girls, taxation, 506
Young women, pay, taxation, 484
Home for Delinquents—
Exemption of country property, 500
Home Mission—
As charity, 172
Gift, void, 240
Homeopathic Medicine—
Trust for, validity, 147
Homestead—
Deaf children, sale, 112
Honor—Inculcation, 214
Horses—See Animals
Fountain for, charity, exemption, 216, 531
Of cemetery, exemption, 520
Horticulture, 205
Hose Company — See Fire Company
Cy pres, 86
Hospice—
Cy pres, traveling friends, 95

(References are to pages)

Hospital—See Sanitarium, Nurse, Tuberculosis Hospital
Ambulance, damage liability, 538
Ambulance, injury to stranger, damage liability, 557
Annuity, validity, 244
As almshouse, exemption, 526
As charity, 188
Bed, endowment, cy pres, 107
Burned and abandoned, termination of trust, 438
Church ownership of, 185
City, damage liability, 538
City refusal to accept, 314
City trustee, statutory directions, 335
Commercial, 188
Commercial hospital excluded, 272
Contagious, incurable, insane, exclusion, 298
Contagious ward, discretion, 264
Contract to furnish competent nurse, 540
Conveyance to by university, effect, 150
Cy pres, 85
Damage liability, 539
Dissolution, cy pres, 98
Disused, exemption, 506
Erection, cy pres, 84
Executory devise, 231
Exemption, does not cover garden, 461
Farm, exemption, 498
For profit, taxable, 470
For souls, church, 163
Foundling, cy pres application, 73
Foundling, gift to, 335
Gift absolute, in trust, 225
Gift for, implied power of trustees, 261
Gift to, perpetuity, 381
Hot bottles, damage liability, 545
Liberal construction, free beds, removal, 402
Maintained by state, gift to, 217
May take pay, 154
Memorial, cy pres, 107
Mortgage, authority, 405
Nurses training school, charitable character, 477, 478
Payment by patients, 157
Payment, physician, 157
Payment, taxation, 481
Physician, injury, damage liability, 557
Railroad, damage liability, 554
Sale of land, power, 111
Scheme for, Methodist Episcopal conference, 281
Statute recognition as charity, 127
Summer roaming ground, 499
Support, gift to, 397n
Temporary, taxation, 505
Trustee for masses, 178
Hospital Corporation—
Gift to city for hospital, exemption, 527
Hospitality—Not a charity, 140
Hotel — See Apartment House, Tavern
Cy pres, 87
In part used for school, exemption, 486
Name, cy pres, 104
Hot Bottle—Damage liability, 553
Hot Water—
Enema, damage liability, 546
House—See Dwelling
Attendant, cemetery, taxation, 518
College, leased, taxation, 513
House of Industry—
Orphan farm as, 525
House of Refuge—
As charity, 187
Damage liability, 538
Workshops, exemption, 478
Houses of School—See Dwelling
Residence by teachers, exemption, 492
Hudson Palisades—
Separating property, exemption, 502
Human Beneficence—
Construction, charity, 272
Humane Motive—
Public Policy, 147
Humane Purpose—
Kentucky statute, 50
Humane Society, 194
Humanity—
Gift to Boston investigator, 159
Suffering, gift for, 280
Idaho—Legal development, 62, 63
Idiots—
State power to accept gift for, 218
Illegal—Condition, Louisiana, 445
Illegality—
Avoids a gift, 243
Number of purposes, cy pres, 101
Illinois—
Condition precedent, 444
Court, discretion, 277
Cy pres, gift insufficient, 106
Devise, proceeds brought to New York, 451
Exemption to foreign corporation, 460
Foreign charities, exemption, 527
Institution, ownership, 474

(References are to pages)

Lease by one charity to another, exemption, 509
Legal development, 61
Masonic home, exemption, 522
New York statute of wills, effect, 454
Ninety-nine year lease, exemption, 507
Northwestern University, 469
Special assessment, exemption, constitutionality, 458
Special charter to charitable corporation, 468
Trust fund theory, damage liability, 542
Woman suffrage, 209

Immorality—Charity, 159

Immunity—
Damage liability, municipal corporation, 537

Impairment—
Contract, cy pres, 117

Imperfect—
Declaration, validity of trust, 396

Implied Contract—
Waiver, damage, liability, 551

Implied Power—To sell, 111

Impossible—
Condition, Louisiana, 445
Trust, court interference, 275

Impossibility—Cy pres, 105

Imposters—Control over, 434

Impracticability—Cy pres, 105

Improvement Fund — See Fund, Endowment Fund
Of cemetery, exemption, personal property, 520

Improvement of Man—
Aim of charity, 121

In—Construed as near, 404

In Trust—
As not creating technical trust, 225
Construction when absolute gift invalid, 402
Corporation, meaning, 225
Technical word need not be used, 319, 320

Inadequacy—Of charity, 149

Incapacity—
Trustee, court interference, 275

Income—
Consistent with charity, 154
Devotion to charity, exemption, 509
Donee limited to using, perpetuity, 377
From beneficiaries, effect, 155
From beneficiaries, taxation, 480
Incidental, taxation, 484
Only to be used, 365
Portion given to charity, perpetuity, 379
Principal, cy pres, 94
Transmission, cy pres, whole fund transmitted, 452
Use, cy pres, 86
Use only, effect, trust, 226

Incomplete Building—
Exemption, 504

Incorporation — See Corporation, Charter, Church Corporation, Stock, Reincorporation
Dispensation of perpetuity statute, 365
Effect after will is effective, 254
Not necessary before statute of Elizabeth, 14
Of donee, after gift, 230
Of trustee, not diversion of trust fund, 326
Termination religious trust, 435
Unincorporated society, effect, future estate, 231

Incumbence—
Condition, grantor receiving full consideration, 446

Indefinite—
Test of charity, private charities, 393

Indefiniteness—See Definiteness
Beneficiaries, 136, 137, 235
Corporation, trustee, purpose beyond power, 228
Disjunctive between charitable and benevolent, 372
Element of charity, 236
Essential, 224
Gift to known person, 289
Louisiana, 54
Of beneficiaries, church, 164
Tilden Act, 35

India—Mission, gift to, 227

Indian Children—
United States, class, 305

Indian School—Taxation, 502

Indiana—
Cross currents, 69n
Exemption of cemetery improvement fund, 520
Legal development, 59
Lodge, charity, 145
Masonic hall, exemption, 522
Perpetuity, definition, charity, 362
Publishing concern, exemption, 489
Relatives, gift to, 394

Indianapolis—
Arsenal grounds, trustee appointed for, 314

Individual—
Ownership, charity, 474

Individual Single—
Gift for, 141

Individual Benefit—
Relative of donor, 299

(References are to pages)

Industrial Home—
Colored children, cy pres, 107
Woodyard, damage liability, 547, 548
Industrial School—
Damage liability, 538
Industries—Arts, 205
Infidel Society—Gift to, 159
Infidelity—See Atheism
Charity, 159
Infirmary—Gift to, 227
Information—
Attorney general, costs, 429
Inguinal Hernia—
Operating on wrong side, damage liability, 548
Inheritance Tax—See Exemption, Taxation
Definition, tax on right to transfer, 523
Exemption, 535
Exemptions, lodges, 144
Liberal construction, 524
Operation of corporation beyond state, exemption, 529
Initiative—Pennsylvania, 209
Injunction—Visitorial power, 418
In praesenti—Gift, validity, 233
Insane Asylum—See Asylum
Insurance company trustee of, 312
One hundred ten acre tract surrounding, exemption, 496
State, damage liability, 538
Insane Hospital—
Cy pres, free bed, 85
Insane Women—
Classification, 295
Insolvency—
Charitable corporation, surplus, disposition, 332
Trustee, court interference, 276
Institution—
Fund, as exemption, 531
Meaning, taxation, property, ownership, 474
Property let for profit, 475
Trustee, attorney general not necessary party, 428
Instructions—
Discretion, trustees, 262
Insufficiency—
Cy pres, 118
Fund, small sum, cy pres, 90
Insurance—
Aid in getting, 196
Secret society, exemption, 523
Insurance Company—
Fire patrols, 195
Trustee of insane asylum, 312
Insurance Society—
Mutual benefit as, 143
Intemperance — See Temperance Liquor
Termination of trust aimed against, 435
Intent—
Cy pres, English doctrine, 72
Discretion, trust or power, 277
Trail, 93
Intention—See General Intention, Special Intention
Cy pres, ascertainment, 77
Cy pres doctrine, 76
Drawn from language, 410
Effort to give effect to, 406
Pole star, 401
Practical suggestions for expression of, 562
Interdenominational Gift—
Validity, vagueness, 167
Interloper—Successor, masses, 180
Inter Vivos—
Charity created, 152
Gift, Maryland rule, 27
Gift to unincorporated society, Maryland, 250
Intermittent Use—Taxation, 533
Interne—Negligence, damage liability, 548
Interpretation—Cy pres, 77
Intervention—
By attorney general, 427
On appeal, attorney general, 429
Intoxicating Liquor—
Suppression, discretion, 260
Invalid Gift—
Separable, commingled, 399
Inventions—
Mechanical, library, 207
Investment—See Reinvestment
Authority for, 402
Bonds, stocks, cy pres, 91
Business property, damage liability, 541
Discretion for, 260, 381
Endowment funds, exemption, 511
Fund, taxation, 512
Land held as, taxation, 500
Not exempted, 462
Sale, cy pres, 85
Invitees—Damage liability, 557
Iowa—
Cross currents, 69n
Foreign corporation, inheritance tax, exemption, 530
Fraternal circle, charity confined to, 531n
Legal development, 67
Name, memorial, cy pres, 107
Irrationality—
Not objectionable, 239
Isms—Opposition to, 210
Isolation Hospital—
Diversion, power of court, 425
James I—
Fourth year, first settlement, statutes, Virginia, 21
Japan—Missions, 173
Jesuba—
Cy pres to Christian religion, 73

(References are to pages)

Jewish Law—
History, 2
Moses, 1
Jewish Religion—See Hebrew Society
Cy pres to Christian religion, 73
Jews—
Charity limited to, 292
Superstitious uses, 174
Job—Ch. 22 v. 6,—2
Joint—
Trustees, townships, incapacity, 312
Joint Trustees—Townships as, 337
Joss House—As charity, 166
Journal—
Universal, discretion, validity, 266
Judge—
As trustee, 326
Power given to appoint trustees, 321
Judgment—
Poor, trustees, court interference, 275
Just—
Before generous, mortmain, 359
Kansas—
Approval of Rhode Island, definition, 140
Farm, school, sale of products, 498
Gift for masses, 180
Hospital, contract for special care, liability, 540
Legal development, 62, 63
Mausoleum, exemption, 520
Kent—
Approval of Camden's definition, 134
Kentucky—
Adoption of English statute, 58
Cemetery, termination, 436n
Class must be designated, 284
Cy pres, 80
Exemption of cemetery improvement fund, 520
Foreign charities, exemption, 528
Gift to donor's day, 194
Institution comprises property let for profit, 475
Legal development, 50
Masonic property taxed, 521
Orphans, masons, charity, 293
Plaintiffs in action to enforce trust, 430
Professorship, 238
Property let for profit, exemption, 475
State as trustee, 339
Trust fund theory, damage liability, 544
Y. M. C. A. license tax, exemption, 515
Kenyon—Cy pres doctrine, 74
Kilty—Maryland report, 25
Kindergarten—Gift to, 214
Kitchen of School—
Exemption, 495
Knight Templar—Exemption, 487
Knowledge—
Coke dictum, 4
Secret trust, mortmain, 354
Labor—
By beneficiaries, exemption, 531
Laboratories—Exemption, 495
Laches—
Termination of trust by, 435
Ladies Aid Society—
Manager of charity, 281
Lame—Home, state, gift to, 218
Land—
Building on which erected, exemption, 461
Investment of endowment funds, 513
Land Contract—
Property of charity sold on as used for charity, 478
Provision that buyer must pay taxes, exemption, 458
Landlord and Tenant—
Relation, professor's residence, 492
Landscape Gardening—
University not organized for, 542
Lapse—
Of charity, 435
Reasonable time elapsed, 438
Reverter clause, cy pres, 99
Latent Ambiguity—See Ambiguity
Definition, 407
Latitude—
Discretion, trustees, 258
Laundry—
Of school, exemption, 495
Temporary building, exemption, 505
Law—
Conformity, 136
Consistency with, 239
Improvement, charity, 209
Lawns—Exemption, 496
League—Incorporation, effect, 255
Learning — See School, College, University, Education
Coke, dictum, 3
Objects of charity, 158
Rhode Island statute, 48
Lease — See Ninety-nine Year Lease, Rent
Assumption by charity lessee to pay taxes, 458, 459
Belonging to charity, 473
By one charity to another, exemption, 509
By professor of school property, exemption, 494

(References are to pages)

Charity, expiring on day after tax day, 477
Commercial purposes, exemption, 508
Form of, interior arrangement of charity, exemption, 508
Ninety-nine years, discretion by trustees, 275
Ownership, exemption, 507
Property to charity, exemption, 507
Provision that charity pay taxes, exemption, 458
Sale, cy pres, 113
School property to public school, cy pres, 109
Termination by one only of trustees, 324
To individual, exemption, 509
To sexton of cemetery ground, exemption, 519
Tuition, exemption, 483
Trust property, 324
Lectures—
In church, termination of trust, 438
Physical science, 207
Lecture Rooms, 207
Legal Tender Notes—
Charity of Boston mechanic, 132
Legal Title—
Legislature, transfer, 316
Legality—
Illegal at Elizabeth's time, 128
Legatees—
Residuary, visitorial power, 422
Legislation—
Exemption without, 466
Placing upkeep of grave among charities, 369
Sanctioning accumulations, 383
Legislative Favor—
To charities, 417
Legislature—
Cy pres power, 116
Power over charitable corporation, 329
Power over perpetuity rule, 365
Transfer of legal title, 316
Lending—Money, charity, 130
Letters—Creating charities, 153
Leviticus—
Ch. 23 v. 22,—1
Ch. 19 v. 9, 10,—1
Liabilities—Of trustees, 323
Liberal Construction—See Construction
Cash on hand, only bonds and stock mentioned, 244
Charity qualifying number of nouns, 267
Condition, 441
Cy pres, 77
Cy pres doctrine, 75
Discretion, 259
Education of negroes, change in policy, 147, 148
Exemption of school, 514
Exemption, reasons, 465
Exemption, state benefit, 465
Immediate gift, 376
In ascertaining purpose, 241
In minority states, 228
Inheritance tax, 524
Inheritance tax, foreign corporations, 530
Massachusetts constitution, 387
Of charities, 392
Perpetuity, 379
Provision for in special charter, effect, 461
Restricted meaning of benevolent, 270
Sense of propriety, 466
Statute of Elizabeth, 11
Liberality—
Definition, distinct from charity, 268
Discretion, validity, 264
Liberty, 210
Library—
Acceptance, condition precedent, 443
Alexandrian Library, Destruction, 207
Alliance of two, gift to one, 397
As charity, 206
As religious charity, 170
Assignment to other library, cy pres, 97
Automobile, injury to stranger, damage liability, 557
Building of, 222
Church, gift to, 226
Cy pres, publication of illegal literature, 102
Dissolution, cy pres, 98
Educational charity, 215
Exemption, charges, 484
Fund for, taxation, 512
Geographic Society akin to, 209
Gift to buy books, published of catalogue, 404
Gift to trustees, discretion, 262
In fraternity house, exemption, 516
Lease to another library, exemption, 509
May be special, 207
Municipal corporation, 334
Named after donor, 134
Non-members, nominal consideration for services, 155
Of military school, exemption, 495
Power of school district to accept, 335
Public, trustees, appointment, 314
Purely public charity, 471
Rebuilding, cy pres, 104

(References are to pages)

School, cy pres, 109
Site, discretion, 263
Tilden will, 34
Unincorporated society, Tennessee, 253
Library Corporation—
Exemption, 532
Library Society—
Cannot take as poor relief agency, 198
License—Mortmain, England, 346
License Fee—
Charity subject to, 458
License Tax—
Y. M. C. A. exemption, 515
Life—
Accumulation for, validity, 382
Remainder to charity, 378
Life Estate—
Charity dependent on, rejection, 402
Charity subject to, 316
Construction of charitable gift, 403
Dependency on, discretion, 261
Gift dependent on, validity, 244
Grantor's occupation free of taxes, effect on exemption, 459
Life Saving Station—
Cy pres, 85, 298
Life Tenant—
Plaintiff to enforce trust, 430
Light—
Supply of city by college, exemption, 487
Like Good Objects—
Discretion, trustees, 316
Limitation—
Of charity, must appear, 398
Power of donor to impose, 440
Limitation Over—
Significance, cy pres, 94
Limited—
In statute of Elizabeth, 11
Liquor—See Anti-Saloon League, Temperance, Intemperance, Prohibition Party
Room in lodge, exemption, 486
Temperance, 192
Liquor Traffic—Temperance, 192
Literary Fund—College, 205
Literary Institution—
Private school, exemption, 514
Loan—
Apprentice, repayment, death, 84
Franklin will, 195
Loan Association—
Not a charity, 196
Lobbyist—
Employment, dissolution, 437n
Local Church—
General church, cy pres, 96
Locality—
Charity in another city, cy pres, 99
Residents, class, 290
Location—
Monument discretion, 274
Lodge—See Masons, Odd Fellows
As charities, 144
Billiard room, taxation, 486
Building for school purpose, 153
Club room, exemption, 516
Home confined to members of, 187
Insurance, taxation, 523
Masonic, gift to, 229
Masons, charity, 53
Master of, trustee by reference, 323
Members of, class, 293
Owner of cemetery, investment of proceeds in business block, exemption, 520
Mutual benefit association, 145
Trustee for charity, 328
Trustee for school, 153
Use of office building, exemption, 486
Lodgers—
Y. M. C. A. taxation, 506
Lodging Houses, 187
Lord's Work—
Gift for, void, 239
Lot—
As covering entire school property, 496
Fifty acre tract in New York City as, 468
Not power to buy, cy pres, 89
Vacant, taxation, 503
Lottery—
Charitable purpose, not exempt, 471
Charity, 136n
Louisiana—
Definition, 139
Discretion, trustees, 306
Federal courts, 68
Foreign beneficiaries, 447
Foreign corporation, inheritance tax, exemption, 530
History of provision for exclusive use, 488
Impossible or illegal conditions, 445
Legal development, 52
Perpetuity, frivolous objection, 373
Special charter to charitable corporation, 468
Love—
God and Man, field of charity, 286
Love of God and Man—
Definition, 129
Luke—Ch. 9 v. 58,—186
Lutheran—Charity limited to, 292
Lyceum—Exemption, 487

(References are to pages)

Lycurgus—
Law, 2
Spartan code, 1
Lyndhurst—
Approval of Camden's definition, 134
Machine Shop—
Of school, exemption, 495
Magna Charta—Mortmain, 341
Maids—See Servant Girl, Girl
Poor, marriage, 190
Maine—
Cy pres, confined to charity, 77
Cy pres, gift, sufficiency, 106
Diminution, 106
Legal development, 65, 66
Lodge, charity, 145
Masonic hall, exemption, 522
Needy relatives, 280
Physician agent of patient, 552
Trust fund theory, damage liability, 543
Majority Vote—
Action of trustees by, 324
Mankind—
Betterment, improvement, discretion, validity, 266
Manners—
Formulation, aim of education, 200
Manual Labor—
Portion of population living by, class, 290
Manual Labor School—
Samuel Miller gift, 23
Manufacturing—
Establishment, blind, 191
Manumission—
Slaves, 192
Slaves, American Colonization Society, 312
Mark—Ch. 14 v. 9,—132
Mardi Gras Company—
Charitable adjunct, license fee, 458
Marine Engineering, 205
Marketable Title—
Sale, court sanction, 115
Marriage—
Encouragement, Louisiana, 54
Poor maids, 190
Marshall, John—Hart case, 5, 21
Marshall, R. D.—
Appeal to Wisconsin legislature, 42
Influence on Wisconsin development, 41, 42
Tilden Act, 35
Mary—
Memorial, Christ, 132
Maryland—
Abolishment of English charity doctrine, 221
Adoption of English statutes, 58
City trustee of charity, 333
Class must be designated, 284
Cy pres, 79
Development, 5
Donation inter vivos to unincorporated society, 250
Federal courts, 68
Georgia mislead, 51
Gift to Scotch charity, 449
Legal development, 25
Liberal construction, 392
Perpetuity, extension, 381
Rule followed in Distrist of Columbia, 28
Statute of Elizabeth, repeal, 20
Trust fund theory, damage liability, 544
Unincorporated society, gift in praesenti, 233
U. S. supreme court decision, influence, 246
Masonic Hall Fund—
Charity, exemption, 531
Masonic Lodge—See Lodge, Odd Fellow
Gift to, 229
Not charity, 146
Masonic Order—Exemption, 521
Masons—
In Boston, class, 289
Lodge, charity, 53
Orphans, charity, 293
Massachusetts—
Adoption of English statutes, 58
Benjamin Franklin will, 195, 365
Bonds by trustees, 325
Coal distribution, 217
Condition precedent, 444
Constitution, charity, liberal construction, 387
Dissolution of corporation, effect, 97
Executory devise, 232
Exemption of Bowdoin college, 528
Exemption of incomplete building, 504
Gray's definition, 136
Influence on Maine, 65
Lease by one charity to another, exemption, 509
Legal development, 58
Legislation, cy pres, 117
National purpose, 212
No mortmain statute, 344
Philanthropy, 270
Respondeat superior, damage liability, 550
Sale of farm products by school, exemption, 497
Taxation, dominant purpose, 490
Trust fund theory, damage liability, 544
Trusts to change laws, 209
Workman's compensation, 558

(References are to pages)

Masses—
Bequest to, inheritance tax, 527
Definition, 177
Exceptional states, 179
Exemption, 533
Gift to validity, 367
Forms suggested, 568, 569
History in England, 177
Memorial, effect, 132
Memorial to name of donor, 131
Minnesota, 179
Missouri, benefit of priest, 179
New York, 179
Particular priests, bishop for priests, 180
Private trust, 179
Validity in America, 177
Wisconsin, 179
Master—
Discretion not delegated to, 274
Report, similar, apportionment, 282
Material—
Church constructed of, cy pres, 107
Cy pres, 85
Maternity Home—See Home
Wayward girls, 187
Matthew—
Ch. 8 v. 20,—186
Ch. 26 v. 13,—132
Ch. 28 v. 19,—171
Mausoléum — See Crypts, Cemetery
Cy pres, underground vault, 86
Exempt as graveyard, 467
Exemption, 519
Mayor of City—
Plaintiff to enforce trust, 429
Trustee by reference, 323
Mecca—Pilgrim, relief, 176
Mechanical Arts, 205
Mechanical Inventions—
Library, 207
Mechanics—
Aged infirm, home, 305
Injury, charitable institution, damage liability, 557
Medals—Educational charity, 204
Medical Attention—
Poor, cy pres, 97
Medical College—
Damage liability, 539
Exempt as school, 514
Medical Department—
Arrangement by lease, exemption, 508
Medical Dispensary—See Dispensary
Free, gift for, 282
Medical School, 191—
As charity, 191
Charitable institution, 474
Institution for profit, charitable character, 202
Members—
Distribution, lodge, 145
Distribution of assets, 332
Division of property, 194
Financial benefit, not charitable, 331
Library association, privileges, 207
Pecuniary advantage, charity, 196
Plaintiff to enforce trust, 430
Poor, relief, 227
Unincorporated society, scattered, 252
Membership—
Accident of selection of beneficiaries, 242
Memorial—See Monument
Charity, 130
Christ, Mary, 132
College, cy pres, 92
Cy pres, 104
Hospital, cy pres, 107
In park, 216
Tablet, cy pres, 88
Memorial Building—
City, trustee, 324
Memorial Purpose—
Cy pres, 94
Memorial Window—
Louisiana, 307
Memory—
General intent, 88
Injustice to narrow construction, 88
Perpetuation, 131
Preservation, cy pres, 71
Mental Suffering—
Unauthorized autopsy, 548
Merger—
Endowment fund, cy pres, 98
Theological seminary, 509
Metaphysical Thought—
Broadest interpretation, gift for, 209, 305
Methodist Church—
As charity, 165
Methodist Episcopal Deed—
Mississippi, 45
Validity, Minnesota, 43
Metropolitan Museum of Art—See Museum
Exemption, 525, 532
Michigan—
Aberration from English charity doctrine, 246
Abolishment of English charity doctrine, 221
Class must be designated, 284
Led astray by New York, 30
Legal development, 38
Middle Ages—
Charities, 4
Cy pres, 71
Middle Temple—
Readings of Francis Moore, 12

(References are to pages)

Military Band—
Not a charity, 133
Military Certificates—
Gift of, 246
Military School—See Soldier
Exemption, 495
Residence of teacher in, exemption, 491
Miller, Samuel—Will, 23
Mingling—
Trust funds, separation, 324
Minister—See Clergymen, Church, Parsonage, Pastor, Priest, Preacher
Education, non-Baptist teacher discretion, 263
Gift for, cy pres, 83
Support, 222
Support, cy pres, 83
Support, gift to, 219
Support, gift to corporation, 225
Support of, gift for, 398
Ministry—
Education for as charity, 170
Education, relative of donor, 299
Gift to, 167
Gift to unincorporated society for, 246
Men preparing, support, gift to, 227
Support, charity, 169
Minnesota—
Aberration from English charity doctrine, 246
Abolishment of English charity doctrine, 221
Class must be designated, 284
Cy pres, 79
Gift for masses, 179
Led astray by New York, 30
Legal development, 43
Swamp land of school, exemption, 502
Mis-appropriation — See Abuse, Mismanagement
Prevention, 425
Misdescription—
Of charity, slight, effect, 414
Of trustee or corporation, 406
Mismanagement—See Abuse, Misappropriation, Perversion
Trustee, court interference, 276
Mission—
Appropriate place, effect, 148
As charities, 171
Certain place, class, 290
Charity, 172
Foreign, gift to church, in trust, 402
Home or foreign, gift to, 226
India, gift to, 227
Mission Board—
Armenia, cy pres, 89
Missionary—
Baptist publication society, 41
Missionary Committee—
Non-existence, effect, 317
Missionary Purposes—
Gift void, 240
Missionary Society—
Charitable institution, 474
Charity, 172
Missionary Work—Foreign, 57
Mississippi—
Constitutional provision, 20
Cy pres, 79
Legal development, 45
Missouri—
Apportionment of exempt and non-exempt property, 509
Class must be designated, 284
Commercial use, taxation, 509
Definition, 139, 140
Hospital, damage liability, 544
Lease by one charity to another, exemption, 509
Legacy for, foreign, domestic, 149
Legal development, 60
Liberal construction, sense of propriety, 466
Masses, benefit of priest, 179
Payment or services by beneficiaries, exemption, 480
Trust fund theory, damage liability, 544
Mode—Discretion, 260
Model Tenement—See Apartment House
Charity, 191
Modestinus—
Cy pres, decision by, 71
Monastery—See Convent, Nuns
Erection, charity, 176
Money—
Gift, perpetuity, 364
Lending, charity, 130
Montana—
Legal development, 62, 63
Monthly Meeting—
Capacity to take, 21
Trustee, 227
Monuments—See Memorial
As educational charities, 208
Erection, power of testator, 179
In parks, 216
Location, discretion, 274
Music, validity, 240
Provision for in cemetery, excessive cost, 368
Site, discretion, 259
To Phillips Brooks, 208
Tulane University, as, 54
Moore, Francis—
Draftsman, statute of Elizabeth, 12
Moral—Significance, 272
Moral Courage—Inculcation, 214
Moral Obligation—
Charitable trust, 142
Secret trust, 354

(References are to pages)

Morality—
Swedenborg, conflict, 148
Mormon Case—Cy pres, 101
Mormon Church—
Fund, cy pres, 322
Gift to bishop, 273
Mormonism—As charity, 165
Mortgage—
Foreclosure, charity property, 160
Investment of endowment funds, 513
Hospital, authority, 405
Mortgagee—
Not to apply for deduction, exemption, 458
Mortis—
Causa, charity, 153
Mortmain—
Check on testator, 398
Classes of statutes in America, 343
English statutes not law in America, 342
Gift in trust for certain corporation, 403
Ground for strict construction, 462
History, 341
In another state, conversion, foreign corporations, 452
Land in excess, exemption, 513
Magna Charta, 341
Masses, gift for, 179
Necessity of investigating statute, 562
New York reasoning, 32
Pennsylvania, 57
Perpetuity distinguished, 341
Relatives, 356
Religious houses, English real estate, 362
Secret trust, 353
Statutory foundation, 343
Mortmain Statutes—
Charity, middle ages, 4
Land in excess taxable, 470
Repeal pro tanto, statute of Elizabeth, 125
Superstitious uses, statute, 14
Mosaic Law—
Orphan, poor, widow, 2
Moses—Jewish law, 1
Mosque—Charitable nature, 166
Motive—
Charity, 131
Class, charitable, 288
Donat's definition, 139
In charitable gifts, 129
Of charity construction, 389
Of donor, discernible, validity, 319
Secret, 130
Moulds—Denominational, 166
Moving Picture—Exemption, 487
Municipal Charities Commission—
Regulation by, 434
Municipal Charity—
Destruction of legal tender notes, 132
Fire patrol, 195
Statute of Elizabeth, 125
Municipal Corporation—See City, Town, Village, County
Acceptance, rejection, 151
Change in effect, 336
Charitable trustee, 333
Damage liability, 537
Division, effect, 337
Expressly authorized, 346
Foreign, 448
Growth, effect, 338
Public purpose, what is, 335
Trustee, limitations, general scope, 333
May be covered by taxation, 212
Not attractive to donors, 213
To raise fund, condition, 375
Trustee, Louisiana, 53
Mural Tablets—
Charity, 131
Memorial, charity, 134
Museum—See Metropolitan Museum, Arts, Fine Arts
Art, taxation, 525
Exemption, 532
Natural history, 207
Purely public charity, 471
Music—
Church gift, exemption, 533
Monument, validity, 208, 240
Mutes—
Trust for, colored and white, 148
Mutual Aid—
Statute of Elizabeth, 146
Mutual Benefit Association—
Sick members, gift to, 291
Mutual Benefit Societies—
As charities, 143
Damage liability, 539
Mutual Insurance—
Secret society, exemption, 523
Mysticism—
Gift for, 159
Name—
Beneficiary corporation, defective, 414
Beneficiaries need not be designated by, 280
Collective, unincorporated society, 252
Donors, part of corporate name, charity, 134
Of donor, cy pres, 107
Perpetuation, 131
Perpetuation, condition for, 443
Perpetuation, merger of college, 439

Unincorporated society, charitable purposes, 251
National—Purpose, charity, 212
National Guard—
Armory, gift to, 218
National Theatre—See Theatre
Gift to, 219
Natural History—
Cabinets, 207
Museum, 207
Naval Academy—
Fitting for, 205
Naval Architecture—
Fitting for, 205
Navigation—
Art of teaching, 205
Society for, gift for church, 459n
"Near"—Construed as in, 404
Nebraska—
Legal Development, 62, 63
Masonic order, nature of, taxation, 521
Necessary Party—
Attorney general, 428
Necessity—Cy pres, 104, 105
Negligence—
Servants, damage liability, 545
Negroes — See Colored, White Children, African Children, Black Race
Advancement, 192
Education, change in policy, 148
Education in public policy, 147, 148
Negro Institute—Payment, 156
Negro Slavery, 210—See Slavery
Cy pres, 85
Nehemiah—Ch. 5 v. 7,—2
Neighborhood—
Description, sufficiency, 242
Deserving poor of, validity, 318
Nelson Morris Plant—
Stockyard fire, 142n
Nephew — See Grand Nephew, Brother, Sister, Relatives
Gift to, execution, 439
Trustee, appointment, successor, 280
Nevada—
Legal development, 62, 63
New Church—
Erection, charity, 168
New Hampshire—
Bonds by charitable trustees, 325
Cy pres, 82
Cy pres, confined to charity, 77
"Exempted by law," interpretation, 528
Legal development, 64
Town, gift, on condition, testator's grave, 372
Trust fund theory, criticism, 544
New Jersey—
Cemeteries, taxation, personal property, 520
Devise, proceeds brought to New York, 451
Exemption to foreign corporation, 460
Exemption of incomplete building, 504
Legal development, 64
Mausoleum, exemption, 519
Special assessment, exemption, 469
Stock corporation, exemption, 515
Unimproved land, exemption, 502
Y. M. C. A. exemption, 516
New Jerusalem—
Doctrine of, gift for, 148
New Mexico—
Legal development, 62, 63
New Orleans—
Trust for orphans, 53
Tulane gift, 54
New Trustees—
Refusal by old, 314
New York—
Aberration from English Charity Doctrine, 246
Abolishment of English Charity Doctrine, 221
Adoption of English statute, 58
Board of education, library, gift, 215
Burial, masses, 179
Class, discretion, 284
Construction not final on Michigan, 39
Corporation extolled as trustee, 327
Court discretion, 276
Cross currents, 69n
Cy pres, 79
Damage liability, stranger, 557
Equity's inherent power, 15
Executory devise, 232
Exemption of incomplete building, 504
"Expressly authorized," construction, 454
Geographic society, 209
Gift for masses, 179
Inheritance tax, exemption, 524
Legal development, 28
Loan, 196
Perpetuity, extension, 381
Personal property, conflict of law, 450
Personal property in, owner resident of Peru, 449
Physician agent of patient, 552
Power of trustees to apportion, gift, 281
Respondeat superior, criticism, 551

(References are to pages)

Revision of 1827, 1828, 29
State as trustee, United States as trustee, 339
State board of charities, 433
Statute of wills, applicability to other states, 454
Statute of wills, mortmain, 345
Tilden will, 33
Trust and use, 318
Unincorporated society, history, 248
Unimproved land, exemption, 502
Waiver, mortmain, 357, 358
Y. M. C. A. exemption, 515, 516
New York Metropolitan Museum of Art—
Exemption, 525
Nick Name—
Of charity, description by, 415
Night School—Cy pres, 109
Ninety-nine Year Lease — See Lease
By charity, exemption, 507
Discretion by trustees, 275
Nominal Rent—
Charitable property taxable, 477
Non-Charitable Object—
Validity, 265
Non-Charitable Purpose—
Discretion, 264, 301
Non-Existence—Trustees, 316
Non-Member
Of church, plaintiff to enforce trust, 430
Non-Residence—
Trustee, court interference, 276
Non-User—
Condition against misuse, reversion, 442
Termination of trust, 437
Norman Conquest—
Charity at time of, 14
Charity in force before, 4
North Carolina—
Adoption of English statutes, 58
Class must be designated, 284
Cy pres, 80
Division of diocese, 338
Influence on Tennessee, 65
Legal development, 49
Quasi corporation, 253
North Dakota—
Legal development, 62, 63
Northwest Territory—
English statutes adopted, 59
Northwestern University—
Taxation, 469
Norway—
Gift to established church, 334
Notes—
Creating charities, 153
Gift by, 150
"Now Exempt"—Meaning, 529
Nuisance—
Property, damage liability, 541
Nuisance, per se—
Reformatories properly conducted, 194
Numbers—
Class of beneficiaries, 289
Nuns—See Convent, Monasteries
Residence in convent adjoining parochial school, exempted, 493
Residence in school, exemption, 491
Nurse—See Hospital
Competent, contract by hospital, breach, 540
Diphtheria, damage liability, 556
Education, character of hospital, 484
Hospital, agent of patient, damage liability, 552
Hospital, agent of physician, 553
Training, charitable character of hospital, 477, 478
Object—
Charitable trust, certainty, 237
Of charity, refusal of trustee to select, 314
Obscurity of Language—
Effect, 401
Not objectionable, 239
Observatory, 205—
Exemption, 495
Occult Science—Gift for, 159
Occupancy—
Caretaker, exemption, 505
"Occupied"—
Abandoned building, 505
For charitable purposes, 473
Meaning, 474
Odd Fellow Lodge — See Lodge, Masons
Benefit society, 146
Office—
Appointment by reference to, 322
Description by, 247
Designation by, construction, 403
Of cemetery on separate lot, exemption, 502
Of church, trustee by reference, 323
Of custodian of cemetery, exemption, 519
Of school, exemption, 495
Use of charity property for, exemption, 509
Office Building—
Exemption, 488
Use by Grand Lodge, exemption, 486
Officers—
Of church, beneficiaries, 184
Of corporation, trustees, 321

(References are to pages)

Of corporation, visitorial power, 420
Official Title—
Trustees selected by, 323
Ohio—
Exemption to foreign corporation, 460
Legal development, 67
New York statute of wills, effect, 455
Professors residence taxation, 494
Oklahoma — Legal development, 62, 63
Old Persons—Homes, 186
Old South Meeting House—
Conservation, 462
Operation—
Unauthorized, liability of hospital, 552
"Or"—
Disjunctive, construction, 405
Use of, 268
Ordinary—Custom of, 15
Oregon—
Legal development, 66
Purely public charity, 471
Trustee, appointment, Christian Science, 309
Organization—
Unincorporated society, 252
"Organized"—Meaning, 397
Original Charities—
Validity in New York, 33
Ornamental Trees—Gift for, 216
Orphanage—
Beneficiaries, 186
Condition, law suit, 394
Gift for, preference, bishop, 304
Orphan Asylum — See Foundling Hospital
Abuse, 425
Construction, 405
Cy pres, 106
Division between wife and, 282
Exemption of cemetery property, 500
Girard will case, 6
Inmates, class, 297
Pay, taxation, 484
Recovery against inmate who has property, 151
Sale to trustees, validity, 114
Summer home, exemption, 499
Orphans—
As beneficiaries, 186
Class, 290, 296
Education, 217
Georgia, decision, 51
Gift for, 41
Home, 217
Masons, charity, 293
Mosaic Law, 2
New Orleans trustee for, 54
Of lodge members, 53
Of Masons, 293
Of ministers, class, 289
Of town, county class, 305
Poor, void gift, 51
Receive pay pupils, power of trustees, 324
Statute of Elizabeth, 199
Orphan Farm—
House of industry, exemption, 525
Orphan Home—See Home
Occupied by caretakers, exemption, 505
Orphan School—
Maintained by state, gift to, 217
Orthodoxy—
Courts cannot pass on, 175
Ostentation—
Motive for charity, 131
"Other"—
Construction, 273
Discretion, 265, 266
Other Purposes—
Construction, 271
Discretion, validity, 265, 266
"Our Benefit"—Construction, 402
Overseers—Trustees, 247
Ownership—
Individual, charity, 474
Speculative, exemption, 504
Paganism—
Devoid of charity, 1
Palisades of Hudson—
Separating property, exemption, 502
Parens Patriae—Cy pres, 75
Parish—
School district, sale, unauthorized, 115
Parish School — See Parochial School
Gift to, 226
Park — See Amusement, Entertainment, Recreation
Appeal to donors, 215
Colored people, city appointed trustee, 314
Condition for, 444
Embellishment, exemption, 462
Fountain, gift to city, 335
Gift for, 216
Gift for purchasing, 397
Graveyard, cy pres, 104
Memorial, 216
Monument in, 208
Rented most of year, exemption, 487
Parliament—
License, mortmain, 346
Parochial School — See Church, Education, School, Denominational School, Parish School
As charities, germane to church, 170
Lease to by another charity, exemption, 509

(References are to pages)

Protestant school, construction, 404
Residence in convent adjoining by nuns, exemption, 493
Parol Evidence—
Ancillary, latent ambiguity, 411
Latent ambiguity, 408
Parsonage—See Minister, Clergyman, Church, Pastor
As charity, 168, 169
Gift for, 441
Memorial, effect, 132
Now exempt, exemption, 529
Sale, reinvestment, 113
Unincorporated society, Tennessee, 253
Part—
Balance also is devoted to same purpose, 244
Part of Plan—
Impossibility, cy pres, 103
Partnership—
Unincorporated society, 254
Pastor—See Minister, Clergyman, Priest, Preacher
Absolute gift, secret trust, mortmain, 354
Majority, selection of beneficiaries, 281
Masses, gift for, 180
Trustee, successor appointed, 315
Patent Ambiguity — See Ambiguity
Definition, 407
Patient—
Class, 290
Nurse or doctor agent of, hospital, damage liability, 552
Patriotism, 209—
Aim of education, 200
Not a charity, 141
Purpose of park memorial, 216
Paul, St.—
Charity never faileth, 388
Pauline Temporary Home—
Cy pres application, 57
Pauper—See Poor
Poor not synonymous, 296
Pauperism—Causes, 183
Pay Patient—
Damage liability, 547, 548
Hospital, commercial, 188
Pay Pupils—
Power of trustees to receive orphans, 324
Payment — See Tuition, Work, Fees, Salary
To employees, power of trustees, 325
To school, hospital, etc., effect, 157
Payment by Beneficiaries—
Effect, 154, 155
Payment for Services—
Advantages, 481
Exemption, 479
Incidental, 480
Peace—Charitable object, 207
Peace Foundation—
As charity, 207
Taxation, 531
Peace Society—As charity, 191
Pennsylvania—
Baldwin J., 6
Benjamin Franklin will, 195, 365
Book store, exemption, 489
Charity corporation, duty of care, 436
Courts, visitorial power, 424
Cy pres, 81
Cy pres, confined to charity, 77
Exemption of incomplete building, 504
Federal courts, 68
Initiative, referendum and recall, 209
Legal development, 55
Masonic home, exemption, 522
New York statute of wills, effect, 455
Ninety-nine year lease, exemption, 507
Purely public charity, 471
Respondeat superior, damage liability, 550
Stock corporation, exemption, 515
Trust fund theory, damage liability, 543
Unincorporated society, 245
Pension—
As charity, 190, 191
Charity, taxation, 478
Cy pres, 85
Old people, gift to, 335
Permanency—
Of charitable foundation, 364
Permanent Trust—
Succession of trustees, 315
Perpetuation—Of name, 131
Perpetuity—
Accumulation, validity, 382
Aimed against accumulation, 363
Charitable not religious, 330
Charitable trust outside, 363
Check on testators, 398
Construction, 402
Corporations excepted, 224
Corporation to aid members of family, 300
Formation of corporation, 230
Grave, burial plot, charity, 369
In another state, 452
Kentucky statute, 51
Legislative power over, abolishment, 365
Limiting gift to the period prescribed by the statute, 370
Minnesota, 44
Mortmain distinguished, 341

Necessity of investigating statute of, 562
New York, Wisconsin, Maryland, extension, 381
Objection frivolous, 373
Present gift to charity, 375
Private trust, 133
Rule refers to vesting not continuance, 376
Taxation, exemption, 459
Test of charity, Rhode Island definition, 139
Tilden Act, 37
Twofold meaning, 361
Wisconsin, 42
Perry—Definition, 139
Person, Single—
Gift for, 141
Known and designated, gift to, 289
Personal Property—
Charity, Michigan, 38, 39
Domicile, 449
Minnesota situation, 44
Real estate, exemption, 527
Situs, charitable gift, residence, 449
Taxable though real estate exempt, 461
Taxation, 461
Trust statute New York, 31
Personal Trust—
Intention, effect, 313
Power, 277
Personality—Perpetuity, 42
Peru—
Resident, gift of personal property, New York, 449
Perversion—See Abuse, Misappropriation, Mismanagement
Educational and religious purpose, eleemosynary use, 158
Intent, English cy pres, 75
Philadelphia—
Benjamin Franklin will, 195, 218
Infidel society, 159
Trust to needy English nationals, 144
Philadelphia Library Association—
Exempt as purely public charity, 471
Philanthropy—See Benevolent
Construction as charity, 273
Definition, distinct from charity, 270
Educational character, 205
Phillips Brooks—Monument, 208
Philosophic Purposes—
Educational character, 205
Physical Exercise—
Facilities, exemption, 495
Physical Science—Lectures, 207
Physical Training—Taxation, 514
Physical Want—
Education need not minister to, 198
Physician—
Carefully selected, damage liability, 546
Hospital, agent of patient, damage liability, 552
Injury in hospital, damage liability, 557
Pay, hospital, effect, 157
Piers Plowman, Vision of—
Statute of Elizabeth, 124
Piety—
Fostered by law, 163.
Objects of charity, 158
Pilgrims—
Reason for coming to America, 174
Pious Uses—
Statute of Elizabeth, 10
Place for Sale—Cy pres, 92
Plans—
Cy pres, proposal, 115
Discretion, trustees, 263
Playgrounds—See Amusement
Exemption, 496
Playhouses—For children, 191
Playroom—For children, 134
Pleasure—See Amusement
Higher, aim of education, 200
Pleasure Pier—
Gift to city for, 245
Poison—
Administration, damage liability, 548
Pole Star—Intent is, cy pres, 93
Policy—Consistency with, 239
Political Economy—
Chair for, 204
Professorship, 204
Political Liberty—Spread of, 210
Politics—Class limited by, 291
Polygamy—
Illegality, Mormon church case, 101
Polytechny—
Gift to, perpetuity, 381
Pomeroy—Definition, 139
Poor — See Pauper, Wealth, Deserving Poor, Rich
All, class, 290
Beneficiary need not be, 135
Benefit, Louisiana, 54
Camden's definition, 134
Care of, public function, damage liability, 537
Church, trustee for, 328
Connecticut, 47
Educational need not be confined to, 199
Educational charity, 214
Emigrants, St. Louis, 297, 298
Friendless, all denominations, 304
Gift for, 41

Gift, fuel, exemption, 531
Gift to town for, 334
Gift to, validity, 372
Home, 186
Medical attention, cy pres, 97
Mosaic law, 2
Mutes, charity, 148
Of county or city, gift to, 319
Ohio statute, 67
Orphans, void gift, 51
Pauper not synonymous, classification, 296
Prudent, cy pres, 83
Rhode Island statute, 48
Village, town, class, 290
Women, classification, 295

Poor Children—See Children
Education, 109, 296
Education, trustee appointed, 319
Gift to church for, 184
Schooling, 222
Support, 222

Poor District—
Damage liability, 538

Poor Farm—
Statute, exemption, repeal, 470

Poor House—
As purely public charity, 471
Cy pres, school, 84
Maintained by state, gift to, 217

Poor Judgment— ..
Trustees, court interference, 275

Poor Members—Relief, 227

Poor Officers—Trustees, 247

Poor Relief, 190, 217—
Abuse in America, 184
American situation, 183
And education, preference, 299
Charity, 189
Charity wider than, 121
Church, action, 182
Church agencies, 184
Coke dictum, 4
Extent of poverty, 183, 185
Too general, 239
Unsectarian, 185

Poor Saints—
Assistance, void gift, 240

Popular Name—
Of charity, description by, 415

Portion—
Given to charity, perpetuity, 379

Position—
Appointment by reference to, 322

Possession Postponed—
Perpetuity, 375

Posthumous, Power of Attorney—
Wide discretion, 282

Postponement—
Dispensation, perpetuity, 376

Power—See Trust
Exercise, mortmain, 357
Exhaust fund, 259
Foreign corporation may take to extent of, 448
Nature, execution, validity, 267
Of trustees, 323
To definite person, cy pres, 115
To establish trust, 151
Trust distinguished, 277
Trustee, to make donations, 153
Void, gift valid, 259

Power in Trust—Tilden Act, 36

Powerplant—
Of college, exemption, 487

Power of Alienation—
Suspended, expunging provision, 400

Power of Attorney—
Posthumous, wide discretion, 282

Power to Sell—
Personal property, real estate, 449
Trustees, 110

Prayers—See Masses
Offering, gift to, 222

Preachers—See Clergymen
Worn out, charity, 143, 169

Preaching—Destitute regions, 222

Preamble—Statute of Elizabeth, 4

Precatory—
Condition to keep grave, etc., in repair, 372

Precatory Words—
Creating charity by, 401

Precedent—
Condition, not favored, 443

Preference—Donor's relatives, 299

Premiums—Cy pres, 85
For scientific treatises, 210

Preparatory School—
Lease to, taxation, 508

Prerogative Power—See Cy Pres, English Cy Pres Doctrine, Royal Prerogative
Charity doctrine, independence, 7
Cy pres starts where stops, 76
Legislature, 116
Not in force in America, 239
Source of doctrine, 8

Presbyterian Church—
As charity, 165
Transfer to Methodists, validity, 167

President's Chair—
Endowment, 204

President of College—
Leasing its property, exemption, 494

President of Institution—
Trustee by reference, 323

President of United States—
Enforcing Smithsonian gift, 339

Presumption—
Of abuse, ancient charity, 403

(References are to pages)

Prices—
For art, educational charity, 208
Priest—See Clergyman
Trustee for masses, 178
Priestcraft—
Gift to Boston investigator, 159
Primary School, 202
Princeton University—
Grounds, construction, 404
Principal—Income, cy pres, 94
Printers—
Benefit association, sick member of, gift to, 291
Printing Office—
Of school, exemption, 495
School, taxation, 495
Private—
Construction as public, charity, 273
Private Charities, 140—
Construed as public charities, 393
Discretion, validity, 264
Examples, 141
Mutual benefit society, 143
Private Property—
Leased to charity, exemption, 507
Used by charity, exemption, 506
Private School—
Academy, seminary, exemption, 514
Public school does not prevent, 201
Religious instruction, 200
Private Trust—
Beneficiaries, uncertainty, 221
Charity resting on, perpetuity, 380
Definiteness, distinction from public trusts, 235
Masses as, 179
Perpetuity, charitable trust based on, 366
Profession—Teaching, 205
Professor—See Teacher
Leasing property of school, exemption, 493, 494
Residence, separation from campus, taxation, 490, 501
Professorship—See Scholarship
Charity, 203
Endowment, gift to corporation, 225
Gift to, 227
Theological, 238
To be created, condition, 441
Profit—
Church control, charitable character, 202
Devotion to charity, exemption, 508
Dominant purpose, exemption, 488
Endowment fund, investment, exemption, 512, 513
Exemption of school, 514
From farm of school, exemption, 497
Medical school, surgery, instruction, 202
Members, antagonistic to charity, 331
Outside property, exemption, 501
Property let for as part of institution, 475
Property let for, exemption, 475
Property used for, damage liability, 541
Railroad hospital, wages, damage liability, 554
Test of charity, corporation, 331
Tuition, exemption, 483
Profitmaking—
School with all earmarks of, 202
Prohibition Party — See Liquor, Temperance, Intemperance, Anti-Saloon League
Trustee, 193
Promissory Note—See Note
Creating charity, 153
Proper Party—
Attorney general, 428
Property—Only taxable, 474
Proportion—
Various charities, power left to trustees, 281
Propriety—Of charitable gifts, 120
Pro tanto—
Application of gift in excess of donee's power, 103
Repeal of perpetuity statute, 370
Void, mortmain, 358
Protective Department—
Damage liability, 539
Protestant—
Charity limited to, 292
Protestant Clergymen—
Definiteness, 240
Protestant School—
Parochial school, construction, 404
Provided—
Construed as not creating condition, 443
Psalms—Ch. 15 v. 5,—2
Public—
Charity, meaning, 287
Essential to charity, 268
Significance of word, 159
Public Advantage—
Of charity, construction, 389
Public Benefit—
Reason for liberal construction of, exemption, 465
Public Charity—
Beneficiaries, selection essential, 261
Public Corporation—
Exemption, 526

Public Libraries—
Educational charities, 215
Public Opinion—
Protection against superstition, 177
Public Policy—
Charity consistent with, 147
Charity, perpetuity, 374
Humane motive, 147
Sustains charities, 364
Violation, charity, 127
Public Property—
Analogy to income producing property of charity, 477
Public School—See School, Education
A charity, 213
Cy pres, 108
Tuition, construction, 403
Upbuilding, 214
Wholly for poor children, cy pres, 94, 95
Public Sentiment—
Creation, charitable purpose, 238
Public Trust—Wealth as, 120
Public Utility—
Implied as charity, 124
Public Works—Charity, 218
Publishing House—
Denominational, exemption, 488
Taxation, 534
Pumping Station—
Of college, exemption, 487
Purchase—
Devise, 345
Expressly authorized, construction, 346
Purely Public—
Construction, 471
Masonic lodge, exemption, 522
Purgatorial Fund—
Charitable gift, 226
Purgatory—See Masses
Masses, validity, 178
Purpose—
Charitable, gift to, 221, 222
Definite, cy pres, 78
Definiteness, 167, 239
Definiteness, Tilden Act, 36
Indefiniteness, impracticability of, execution, 241
Liberal construction, 241
Must be definite, 238
Public, charitable trust, 237
Reasonable certainty, Kentucky, 50
Quakers—As charity, 165
Quasi Corporation—
Foreign, trust to, 448
Gift to, validity, 327
Trustee, incapacity, 312
Unincorporated society, 253
Quasi Trust—
Confusion, damage liability, 553
Corporation, charitable, 328
Quasi Trustee—
Charitable corporation as, 326
Race—See Negro, Colored, White Race
Class limited by, 291
Classification by, 293
Promotion of moral, intellectual condition, vagueness, 239
Race Prejudice—Sale, school, 112
Railroad—
Hospitals, damage liability, 554
Separating property, exemption, 501, 502
Railroad Employee—
Injury, waiver, 551
Railroad Hospital—
Selection, damage liability, 555
Railroad Track—
Separating land from cemetery, exemption, 519
Reading Public—City, 298
Reading Room—
Tilden will, 34
Real Estate—
Conversion to personal property, state may authorize, 117
Exempted, personal property taxable, 461
Exemption, personal property, 527
Mortmain statute, foreign corporation, 453
Sale authorized by using word "fund", 405
Situs, charitable gift, 449
Situs, sale, proceeds transferred to another state, 451
Reasonable Care—
Selection of servants, damage liability, 546
Reasonableness—
Test, charity, 387
Recall—Pennsylvania, 209
Record Commission—
England, report, 6, 16, 17
Recreation—See Amusement, Entertainment, Theatre, Dancing, Billiard Room, Card Room, Club, Concert, Park, Playground, Pleasure, Summer Home
As a charity, dancing, 210
Charity, club for, 155
Recreation Hall—
Of military school, exemption, 495
Recreation Rooms—
Exemption, 496
Rectory—Sale, reinvestment, 113
Red Cross Society, 191—
Gift to, 188
Redemption Rights—
Trustees take subject to, 324
Reduction—
Mortmain, 358

(References are to pages)

Revocation, mortmain, 353
Reference—
Appointment by trustees, 322
Referendum—Pennsylvania, 209
Reformation—
Educational movement, 199
Statute of Elizabeth, 162
Superstitious uses, 15
Reformatories—
Not nuisance, 194
Refreshment Room—
In lodge, exemption, 486
Refuge—
House of, damage liability, 538
Refusal—Of trustee, effect, 313
Reincorporation — See Corporation, Incorporation
Effect, 278
Exempted by law, effect, 529
Reinvestment—See Investment
After sale, 110
Sale, 112
Rejection—
Of charity, 151
Premature, during life estate, 402
Relations—Distribution, 274
Relatives — See Brothers, Sisters, Nephew
Mortmain, 356
Needy, designation, power, 280
Needy, gift for, 394
Of testator, class, 300
Preference, 299
Propriety of gift to charity, 120
Relator—
Importance in information, costs, 429
Relief of Poor—
Charity wider than, 121
Relief—
Preference, poor, 299
Tax paying class, 212
Religion—See Church, Denomination
Christian, advancement, validity, 302
City, power to promote, 336
Class limited by, 291
Definition, 163
Disestablishment, cy pres, 74
Excluded from charity, effect, 158
Gift to tear down, 158
Gift void, 240
In educational charities, 200
Use for benevolence, perversion, 158
Religious—
Not charitable, perpetuity, 330
Religious Charity — See Church, Denomination
American founder's religious opinion, 158
Distinct from other charities, 161
Education for ministry, 170
Exemption, 457, 533
General intention, 95
State control, 161
Statute of Elizabeth, 162
Statute of Elizabeth, disfavor, 125
Religious Community—
Gift to member, 142
Religious Conviction of Founder—
Significance, 158
Religious Corporation—
Foreign, West Virginia, 448
Mortmain, Massachusetts, 344
Not exempt where incorporated under general incorporation statute, 533
Religious Establishment—
Effect on charity doctrine, 9
Religious Instruction—
Private schools, 200
Religious Liberty—
Charity, New York, 32
Recognition of religious charities, 161
Superstitious uses, 176
Religious Obligation—
Charitable trust, 142
Religious Order—
Summer home, taxation, 499
Religious Purposes—
Described, 164
Educational features, 170
Gift to church, 252
Religious School—
Deed of church to, 366
Religious Society—
Cemetery, gift to for, 371
Religious Trusts—
Wider in U. S. than England, 176
Religious Uses—Masses, 367
Remainder—
Life tenant dead, value, life tables, 357
Perpetuity, 378
Remoteness—
Charitable property used to produce income, 477
Removal—
From city, lapse of charity, 402
Of charity, to trustee advantage, 324
Of home, cy pres, 86
Of trustee, 316
Trustee, discretion, 276
Rent—See Lease
Exemption, 462
Matter of bookkeeping on school property, exemption, 494
Nominal, taxation, 485
Receipt of, taxation, 508
Renting—
Of park, exemption, 487

Of property "belonging" to charity, 473
Repair—
Burial plot, 368
Erection, cy pres, 96
Tomb, vault, trust, 371
"Repair of Churches" — See Church
Extension, missions, 172
Gift to, 226
Statute of Elizabeth, 162, 168
Repayment—By beneficiary, 204
Reported Cases—
Not in existence before the statute of Elizabeth, 16
Rescue Mission—
As charity, 191
Wood splitting outfit, exemption, 478
Research—Colonial history, 208
Reservation—
Of visitorial power, 418
Reservoir—Exemption, 503
Residence—
Of teacher in school property, exemption, 490
Personal property, situs, 449
Teachers, taxation, 534
Residuary—
Legatee or devisee, visitorial power, 422
Residue—
Codicil, mortmain, increase, 352
Construction, 244
Purpose clear, underestimation, 244
Resolution—
For charity, effect, 476
Respondeat Superior—
Damage liability, 549
Restaurant—
License tax, Y. M. C. A. exemption, 515
Restoration—
By beneficiary, charity, 383
Resulting Trust—Condition, 436
Revenue—
From building, exemption, 508
Reversion—
Condition, 436
Condition, law suit, construction, 394
On condition, broken, 441
Reverter—See Condition ,
No condition, implied condition against, 437
Reverter Clause—See Condition
Absence, 99
Importance, cy pres, 98
Inapplicable, cy pres, 99
Occasional misuse, 442
Pennsylvania situation, 57
Revocation—
Reduction, mortmain, 353
Reward—Of pupils, charity, 170
Rhode Island—
Bonds by trustees, 325
Cy pres, confined to charity, 77
Definition, 139
Legal development, 48
Pay patient, damage liability, 548, 549
Physician agent of patient, 552
Rich—See Poor
As subject of charity, 134
Camden's definition, 134
Education, benefit to, 199
Right—
Charity, mutually exclusive, 236
River—
Separating property, exemption, 502
Road—See Turnpike Road
Separating cemetery from other tract, exemption, 519
Separating property, exemption, 501, 502
Rockefeller Foundation—
Charity, exemption, 531
Roman Catholic Church — See Catholic Church
As a charity, 165
Roman Law—
Connection with English law, 3
Cy pres, 71
In Louisiana, 52
Twelve tables, 1
Room—Endowment, cy pres, 104
Roomers—Taxation, 534
Royal Prerogative—See Prerogative, Cy Pres, English Cy Pres, Doctrine
Cy pres, America, 72
Kentucky statute, 51
Not recognized, 52
Source of doctrine, 8
Statute of Elizabeth, 10
Ruth—
Book of charity, 1
Ch. 22 v. 15, 16,—2
Ryan—
Influence on Wisconsin development, 40, 42
Sacred Order—
Payment, taxation, 481
Sailors—See Seamen
Relief, Society for, taxation, 459n
Widows and orphans of, 262
Widows and orphans of, gift to, 335
St. Albans—
Abbot of, statement to the Conqueror, 15, 341
St. Louis—
Charitable institutions, limited to, 305
Gift to emigrants to settle in West, 335
Poor emigrants on way to West, 217

(References are to pages)

St. Paul—Eulogy of charity, 130
Salary—See Payment, Wages
Clergymen, insufficient salary, 298
Deduction, rent, exemption, 494
Teachers, increase, 204
Teachers, public school, help, 214
To employee, exemption, 478
Sale—See Dedication
Condition against, express, 112
Cy pres, 109
Division between charities, 112
Investment, cy pres, 85
Lease, cy pres, 113
Legislature, power to authorize, 116
Must be beneficial, 114
Of farm products by school, exemption, 497
Place of, cy pres, 92
Power of, trustees, 111
Prevention, attorney general, 428
Real estate, cy pres, 104, 105
Real estate, proceed taken to other state, 451
To trustees, validity, 114
Salvation Army—
As charity, 165
Exemption, 533
Local unincorporated branch, gift to, 319
Unincorporated branch, 44
Samaritan—
Charity by, 136
Sanitariums—See Hospital
Commercial, 188
Damage liability, 539
Payment, 157
Use of charity as, exemption, 482
Savings Association—Charity, 196
Savings Bank—
Charity limited on donation to, 380
Not charity, 196
Scheme—
Cy Pres, proposal, 115
Power of trustee to devise, 279
Scholarship, 203 — See Professorship
Discretion, school, 306
Preference, 299
Tuition, cy pres, 109
School — See Education, College, University, Public School, Boarding School, Medical School, Private School
As religious charities, 172
Authorities, decision, effect on exemption, 490
Benefit society generally, 203
Boarding, exemption, 486, 487
Boarding house in vacation, exemption, 485
Charitable institutions, 474
Commercial, discretion, validity, 265
Common school, charitable character, 203
Connecticut, 47
Cy pres, public schools, 109
Dedication, cy pres, 108
Dissolution, cy pres, 98
Dwelling leased to, exemption, 507
Endowment, exemption, 512
Exemption statute, implies elementary school, 514
Girls, discretion in trustees, 258
In part used as hotel, exemption, 486
Lease to preparatory school, exemption, 508, 509
Lodge as trustee for, 153
Lutheran, transfer, 167
Manual labor, 23
Medical college exempt as, 514
Not applied cy pres to academy, 95
Parish, gift to, 226
Payment by scholars, 156
Personal property, exemption, 461
Property, extent of exemption, 489
Public, gift to, 213
Scholarship, discretion, 306
Scientific and literary institution, 514
Selection of teachers, cy pres, 118
Statute of Elizabeth, 199
Stock, charity, 331
Support, gift to, 397
Taxation, legislative policy, 513
Tuition, free, general intent, cy pres, 94
School Books—Purchase, 214, 217
School Building—
Residence of teacher in, exemption, 490
School Commissioner—
Damage liability, 538
School District—
Abolishment, cy pres, 84
Abolition, township school substitution, effect, 336
Damage liability, 538
Division, colored district, cy pres, 83
Gift to for school, 213
Library, 215
Parish, sale, unauthorized, 115
Power to take library, 335
Trustee, incapacity, 312
Schoolhouse—
Contributors, War of 1812, compensation, 439
Disused, exemption, 506
Grounds, trees, gift for, 216

(References are to pages)

School Library—See Library
Cy pres, 109
Science—
Academy of, 207
Physical, lecture, 207
Scientific and Literary Institution—
School exempt as, 514
Scientific Discovery—
Abstract, discretion, validity, 265
Scientific Institution—
Seminary exempt as, 514
Scientific Objects—Tilden Will, 34
Scientific Treatises—
Premium, 210
Seal—Required, power, 401
Seaman's Aid Society—
Discretion, 262
Seamen—See Sailors
Destitute, 298
Destitute, aid, discretion, 262
Gift for, lapse, 100
Gift to, inadequacy, 150
Homes, 186, 187
Secret Society — See Lodge, Masons
Exemption, 521
Taxation, 534
Secret Trust—
Moral obligation, 354
Mortmain, 353
Secretary of State—
Filing of certificate, foreign corporation, 447
Section—
Extends only to campus of school, 461, 462
"Secular Business"—Taxation, 508
Security—
Provision eliminated, 118
Selection—
Beneficiaries, 36
Beneficiary, discretion, 261, 263
Beneficiary, writing, necessity, 281
Care used, damage liability, 537
Louisiana law, 52
Railroad hospital, damage liability, 555
Servants, damage liability, 545
Selfishness—
Trustees, court interference, 276
Seminary—See Theological Seminary
Exempt as scientific institution, 514
French, trustee, incapacity, 312
Investment, taxation, 462
Private school, exemption, 514
Professorship, endowment, 225
Residence of teacher, exemption, 490
Separable—Invalid gift, 399
Separation—
By street, railroad, river, exemption, 502
Church and state, religious charities, 161
Of property, taxation, 500
Sequestration—
Of fund given to church, 425
Sermons—
Course of, charity, 169
Servant Girl — See Maids, Girls, Sewing Girls
Gift for, 262, 335
Servants—
Negligence, damage liability, 545
Services—
Divine, upkeep in chapel, 222
"Set Apart"—
Use, taxation, 506
Settlement—See Compromise
Charity, exemption, 525
Of charity litigation, validity, attorney general, 431
Settlement Work—Fees, 155
Severance—Taxation, 511
Seventh Day Adventist Church—
Gift for, 43
Sewing Girls — See Maids, Girls, Servant Girls
Gift for, 227
Sex—
Classification by, 294
School confined to one, 203
Sexton—
Cemetery, exemption of land occupied by, 519
Discretion as to, 260
Sexual Organs—
Instruction in proper use of, 205
Shakers—Resulting trust, 436
Shares—Implied power to sell, 111
Sheep—
Illustration of minute direction, 258
Shelter—Homeless persons, 186
Shoeshop—
Of school, exemption, 495
Sick—Home, 186
Sign Manual — See English Cy Pres Doctrine
Cy pres, 72
Purpose of trust uncertain, 238
Silence—
Secret trust, mortmain, 354
"Similar"—
Construction, 242, 397
Masters' report, apportionment, 282
Simultaneous Death—
Mortmain, 356
Singing—Gift for, 441
Singing School—
In church, termination of trust, 438

(References are to pages)

Single Person—Gift for, 141
Singular Number—
Student, worthy, construction, 404
Sinking Fund—Cy pres, 104
Sisters—See Relatives, Brothers
Class, 300
Hospital, pay, taxation, 483
Of church, gift, 166
Sisters of Charity—Gift to, 240
Site—
Library, discretion, 263
Monument, discretion, 259
Of charity, cy pres, 92
Situs—
Real and personal property, 449
Real estate, donor non-residence, mortmain, 453
Skating Grounds—Exemption, 496
Slavery—
Charity for, 148
Creating sentiment against, 210
Cy pres, 85
Termination of trust aimed against, 435
Slaves—See Negroes, Colored
Charity, 190
Emancipation, 45
Fugitive slave law, 400
Gift of, validity, 147
Manumission, 192
Manumission, American colonization society, 312
Sleeping Room of School — See Dormitory
Exemption, 495
Small Amount—Perpetuity, 379
Smithsonian Institute—Gift of, 339
Social Liberty—Spread of, 210
Social Welfare—
Discretion, validity, 265
Socialism, 210
Society—Grant, charity, 153
Society, Charitable—
Plaintiff to enforce trust, 430
Soldiers—See Military School
Confederate, gift for, perpetuity, 378
Disabled, class, 297
Soldiers Home—See Home
Damage liability, 538
Gift to, 218
Solicitation—
Control by commission, 434
Sonny, Bernard E.—
Chicago stock yard fire, 142n
South—
Colored people of, class, 305
South Carolina—
Cy pres, 80
Legal development, 64
Negligence in selecting servants, damage liability, 545
Trust fund theory, damage liability, 543
Unincorporated society, partnership, 253
South Dakota — Legal development, 62, 63
Spartan Code—Lycurgus, 1
Special Act—
Corporation, cy pres, 86
Special Assessment—See Assessment
Tax distinguished, 458
Special Charter—See Corporation
Contract for exemption, consideration, 469
Creating contract for exemption, 468
Provision for liberal construction, 461
To charitable corporation, liberality, 468
Special Intent — See Intention, General Intention
Cy pres, definition, 82, 86
Forfeiture clause, cy pres, 84
Trustee, power, 114
Practical suggestions for expression of, 562
Room to exhibit donor's art collection, 94
Specific Performance—Cy pres, 77
Specific Purpose—
Rhode Island statute, 48
Spelling Books—
Instruction may be limited to, 206
Spiritual Interest—
Charitable purpose, 163
Spiritualism—
Gift for, valid, 159
Sponge—Damage liability, 548
Stable—
Of military school, exemption, 495
State—
As trustee, 339
As visitor, 419, 423
Charity relieved from burden, 120
Children, poor limited by, 296
Contribution, mortgage foreclosure, 160
Contribution to charity, reverter, 444
Debt, gift to, 219
Division on English charity rule, 20
Exception, mortmain, city, 352
Interested in charitable trusts, 426
Only person to raise validity of mortmain, 349
Orphaned Masons of, class, 290
Parens patriae, attorney general, 427
Poor of, class, 304
Power to accept gift, 218
Residents, class, 290

(References are to pages)

Transfer to by corporation, cy pres, 98
Tuberculosis hospital, gift to, 219
State Aid—
Exemption, 525, 527
State Benefit—
Reason for liberal construction of exemption, 465
State Board of Charities—
New York, 433
State Law—
Charity cannot nullify, 556
State University—See University
Exemption, 526
Gift to, 214
Statuary—Parks, gift to, 216
Statute—
Cannot alter rule that sale must be beneficial, 114
Cy pres, 105
Do not create contract for exemption, 470
Exemption must appear by, 460
Foundation of mortmain policy, 344
Gift need not be more definite than, 401
Prior to statute of Elizabeth, 13
Sanctioning accumulation, 383
Terms used in charitable gift, 237
Statute of Distribution—
Power of ordinary, 15
Statute of Elizabeth—
Academic question in England, 10
Adoption in America, diversity, 221
Arkansas, 61
As defining charities, 123
Attorney general a party, 427
Basis of charity doctrine, 5
Charitable purpose, exemption statute, 470
Charity doctrine, independence, 7
Charity, technical meaning, 267
Clarified by Girard case, 31
Connecticut, 47
Connecticut statement of reason for, 13
Colorado, 61
Construction, America and England, 4
Corporations could take before, 223
Demand for, 15
District of Columbia, 28
Early opinion of, 5
Education, 199, 201
Educational purposes, 125
Eleemosynary purposes, 125, 189
Enumeration adopted in North Carolina, 49
Enumeration, significance, 127
Erection of new churches, 168, 243
Evidence of charity doctrine existent before, 18
Extension as to religious uses, 168
Florida, 61
Francis Moore, 12
Georgia, 51
Grant's definition, 124
Gray's definition generalization of, 137
Held wiped out by Hart case, 21
Holding of Hart case, 22
Illinois, 61
Indiana, 59, 60
Influence in America, 123
Iowa, 68
Is charity doctrine dependent on it, 9
Kentucky, 50
Liberal construction, 26, 388
Libraries, 206
Lodge a charity within, 144, 145
Maine, 66
Maryland, 26
Maryland, repeal, 20
Massachusetts, 59
Missouri, 60
Municipal purposes, 125, 212
Municipality as trustee, 333
Mutual aid, 146
New Hampshire, 64
New Jersey, 64
New York, 29
New York repeal, 31
Object, 10
Object to provide a remedy, 18
Ohio, 67
One of three sources of doctrine in England, 8
Oregon, 66
Parochial school, 170
Parsonage, 168
Pennsylvania, 55
Power of courts before, corporation, 223, 227
Preamble analyzed, 125
Preamble, construction, 4
Preamble important portion, preamble cited, 17
Purpose to clarify mortmain situation, 342
Purpose to create commission, 433
Reason for, 47
Record commission, 6
Reenactment, Connecticut, 457
Reformation, influence, 162
Religious charities, 162
Religious purposes, disfavor, 125
Repair of churches, 162, 168
Repeal in certain states, 20
Repeal in Maryland, 25
Repeal in Michigan, 39
Rhode Island situation, 48

(References are to pages)

Schools, 199, 201
Slaves, 190
South Carolina, 64
Statutes preceding, 13
Tennessee, 65
Twenty-one classes of trust enumerated, 126
Unincorporated societies, 245
Virginia, 24
Virginia, repeal, 20
Visions of Piers Plowman, 124
West Virginia, 25
Wyoming, 61
Statute of Wills—
Applicability to other states, New York, 454
Stenography School — See Business College, Trade School
Exemption, 514
Stevens, Thaddeus—
Construction of will, 441
Stewards—Trustees, 247
Stock — See Corporation, Incorporation
Construed to cover cash, 244
Implied power to sell, 111
Investment, cy pres, 91
Investment, cemetery taxation, 513
Test of charity, corporation, 331
Visitorial power in holders, 419
War, rise in value, cy pres, 104
Stock Corporation—See Corporation
Exemption, 514, 515
Stockholders—
Charitable corporation, 224
Stock Yard Fire—
Nelson Morris Plant, 142n
Store—See Cooperative Store
Cooperative of school, exemption, 495
In college, exemption, 486
Use of charity property for, exemption, 509
Storey—Hart case, 5
Stranger—
Cannot question mortmain disposition, 348
Damage liability, 556
Street—
Making land useless, sale, 113
Separating houses from school, exemption, 493
Separating property, exemption, 501
Street Construction—
Ambiguity, 463, 464
General rule, exemption statute, 460
Inheritance tax, 527
Limitation, 462
Reason for, 461
"Strictly Charitable"—
Masonic lodge, taxation, 522
Striking Workers—Fund for, 191
Students—See School, Tuition
Income, absorption, cy pres, 91
Looker on, damage liability, 557
Ministry, 227
Prospective, plaintiff to enforce trust, 430
Tuition, effect, 155
Women, classification, 295
Studios—See Arts, Fine Arts
Institute of fine arts, 208
Study Room—
Of school, exemption, 495
Subject Matter—Certainty, 243
Subscribers—Interest in fund, 439
Subscriptions—
To charity, 152
Visitorial power, 420, 421
Subsequent—
Condition favored, 443
Substitution—
Louisiana, 306
Louisiana law, 52
Succession—
Of charities, perpetuity, 366
Successors—
Appointment, 320, 562
Construction, 403
Corporation, gift given to, 315
Court approval, 322
Interloper, masses, 180
Of corporation, mortmain, 358
Power of appointment, failure, 278
Trust to, 279
Trustees, appointment, 321
Trustee, appointment, cy pres, 115
Suffering—Relief, 222
Sufficiency—Gift, cy pres, 106
"Sufficient"—
To carry out definite purpose, validity, 244
Suffrage—See Woman Suffrage
Woman, 209
Woman, classification, 295
Suicidal Mania—
Damage liability, 548
Sum—
Gift not to exceed a certain, validity, 244
Summer Home—See Amusement, Entertainment, Recreation
Exemption, 498
Orphan asylum, exemption, 500
Students of religious order, 499
Unimproved portion, exemption, 502
Summer Resort—
Exemption, 487
Religious order, exemption, 499
Sunday Schools—
As charities, 170
Church appointed as trustee, 311
Gift to, 226
Publishing concern, exemption, 489

(References are to pages)

Supernatural Belief—
Opposition to, charitable use, 159
Superstition—
Gift to Boston investigator, 159
Matter of belief, 166
Middle ages, effect on cy pres, 71, 74
Superstitious Uses—See Masses
History in England, 174
Impossible in America, 174, 175
Reformation, 15
Statute of, 14
Statute of Elizabeth, 124
Supervision—
By commission, 433
Conflict of law, 451
Courts, trusts subject to, 283
Permanent trust, succession of trustees, 315
Supper, Church—Exemption, 484
Supreme Court—
Appeal to, costs, 432
Original jurisdiction, visitorial power, 426
United States, error copied by Virginia, 21
Sureties—
County treasurers, charity held by, 322
Surgeon—
Hospital, agent of patient, damage liability, 552
Surgery—
Instruction, profit, medical school, 202
Surplus—
Insolvency, disposition, 332
Payments, taxation, 482
Swamp Land—Taxation, 502
Swayne—Definition, 138
Swedenborg—
Cy pres application of gift, 86
Spreading of doctrine of, 148
Synagogue—
Charitable nature, 166
Synod—Executory, 231
Tablet—
Memorial, general intent, cy pres, 88
Tailor Shop—
Of school, exemption, 495
Talmud—
Publication, charity, 176
Tavern—See Hotel
In connection with school, exemption, 495
Taxation — See Exemption, Assessment, Inheritance Tax
Burden lessened, effect, 118
Condition not to be lowered, validity, 214
Exemption, lodges, 144
Relief from, 212
Test of charity, 212
Taxes—Definition, 458
Taxpayer—
Largest, trustees by reference, 323
Plaintiff to enforce trust, 430
Relief, 212
Tax Rate—
Gift on condition not to lower, 214
Tax Sale—
Cemetery grounds, exemption, 517
Teachers—See Professor
Benefit association, sick member of, gift to, 291
Payment, cy pres, 78
Residence, taxation, 490, 534
Salary, 204
Wages, 214
Technical Language—
Necessity, 219, 242, 400
Temperance, 192
Temperance Purposes — See Liquor, Anti-Saloon League, Intemperance, Prohibition Party
Vagueness, 240
Temperance Society—
Power to take gift, cy pres, 83
Temperance Union—
Charity, 192
Exemption, 532
Temporary Building—
Exemption, 505
Temporary Charities, 435
Tenants in Common—
Churches, cy pres, 104
Tenement—Model, 191
Tennessee—
Cy pres, 80
Grave, care of, invalidity, 372
Leased property, exemption, 508
Legal development, 65
Masonic property not taxed, 521
Publishing concern, exemption, 489
Trust fund theory, damage liability, 544
Unincorporated society, library and parsonage, 253
Tents—
Erected by charity, exemption, 505
Termination—
Of charitable trust, 435
Power in trustees, discretion, 306
Territories—
Congress, cy pres application, 117
Test—
Charity, perpetuity, 361
Of charity, taxation, 212
Texas—
Legal development, 67
Publishing concern, exemption, 489

(References are to pages)

Residence in school property, exemption, 491
Textbook—
Free to poor pupils, 483
Theatre—See Amusement, Entertainment, Recreation, National Theatre
Exemption, 487
Gift for, 210
National, gift to, 219
Use of charity property for, exemption, 509
Theological Seminary—See Seminary
Gift to, 227
Merger, 509
Residence of bishop in, exemption, 492
Theology—Chair for, 204
Theosophic Society—
Exemption, 487
Ticket—
Lottery, charity, 136n
Tide—
Ebb and flow on cemetery land, exemption, 519
Tilden Act—
Cy pres, 79
History, 285
Michigan copied, 39
New York, 34
Perpetuity, extension, 381
Personal property, conflict of law, 451
Unincorporated society, 249
Tilden Samuel—
Biography, 33, 34
Will, effect, 33, 285
Time—
Cy pres, 92
Shortness of use, exemption, 487
Title—
"Exclusively used," immaterial, 473
Title Deeds—
Delivery, charity, 153
Tobacco—
Exclusion, class, 291
Toleration Statutes—
Gifts for masses, 177
Tomb — See Cemetery, Burial, Grave
Repair, condition subsequent, 371
Tools—
Of cemetery, exemption, 520
Tort—
Contract, breach, charity, 540
Town—See City, Municipal Corporation, Township, Village, County
Aged, class, 296
As charitable corporation, 467
Cemetery, gift for, 371
Change to city, effect on charities, 336
Construed as city, 338
Damage liability, 538
Funds, discretion, validity, 266
Gift for poor, 334
Gift on condition to repair grave, 372
Gift to poor not paupers, 217
Payment of expenses, 219
Poor, class, 290
Power to support clergyman, condition, cy pres, 102, 103
Refusal to accept cemetery, 314
Trustee for library, 215
Trustee of public cemetery, 335
Widows and orphans of, class, 305
Townhall—
Gift to, 218
Township—See Town
Children poor limited by, 296
Division, effect, 337
Education, taxation, condition, 214, 215
Gift to poor of, 217
Grant by, charity, 153
Trustee, incapacity, joint, 312
Tracts—
Seventh day adventist church, 43
Tract Societies—
As charities, 172
Trades School—See Business College, Stenography School
Exemption, 532
Trail—Intent, 93
Training School—
Nurses, taxation, 478
Tramp—Relief, 182
Transfer—
One denomination to other, 167
Transgression—
Trustee, court interferences, 276
Transposition—Words in will, 400
Travellers—
Poor, St. Louis, 297, 298
Treasurer—
Appointment by reference to position of, 322
Corporation, mortmain, 358
Foundling Asylum, gift to corporation, 229
Trustees, 247
Treatises—Premium, 210
Trees—Ornamental, 216
Trees and Shrubs—
Property beautified by taxation, 496
Trenton—
Dorcas Society, trustee appointed for, 314
Trinitarian—
Class limited to, 292
Trust—See Power
Abolished except as enumerated, 221
Annuity attached to, 331

(References are to pages)

Breach, removal to another village, 96
Declaration of, charity, 153
Definiteness, charities, private trust, 235
Indefinite intention, sufficiency, 287
Louisiana, 52, 54
Ordinary jurisdiction, source, 8
Ordinary, rules inapplicable to charitable trust, 388
Power distinguished, 277
Technical, gift to corporation for corporate purpose, 225

Trust Funds—
Damage liability, 542
Mingled separation, 324
Quasi-trust, confusion, 553

Trust Statute—
California, 62
Michigan, adoption of, 38
New York, 29
Wisconsin adoption, 40

Trust Theory—
Criticism, damage liability, 549

Trustee—
Acceptance, 151
Accounting dispensed with, 424
Action by majority vote, 324
Anti-Saloon league, 193
Appointed by court, discretion, 261
Appointment, as clarifying donor's intention, 317
Appointment, by court, donor's wishes, 310
Appointment by reference, 322
As parties, 431
Bishop, diocese, 303
Change of perpetiuity, 366
Church, denominational coloring, benevolence, 185
City appointment, coal distribution, 217
City, damage liability, 538
City for library, 215
Clergymen, effect, 185
Compensation, 324
Contrariety, effect, 280
Control, exemption, 459
Corporation, mortmain, 358
Costs, 432
Court appointment, death, 280
Creation, mortmain, policy, 345
Cy pres, 115
Cy pres pre-supposes, 76
Description, by office, 247
Discretion, court exercise, 273
Discretion, Tilden will, 34
Dissolution, Tilden act, 37
Failure, reversion, 99
Failure to appoint beneficiary, cy pres, 104
Gift direct to unincorporated society, 252
Gift for unincorporated society, validity, 247
Gift to of religious community, 166
Incapacity, effect, 311
Inability to act, cy pres, 103
Incapacity, Tilden act, 37
Incorporation, not diversion of trust fund, 326
Indefinite class, validity, 302, 303
Indefinite trust, example, 222
Instruments of distribution, 317
Large class, importance, 302
Lodge as, charity, 145
Lodge for school, 153
Louisiana, 54
Masonic lodge, seven to corporation, 228, 229
Masses, 178
Misdescription, 406
Necessity, charity, 309
New, appointment, attorney general, 429
No appointment, cy pres, 318
Non-existence, 316
Obligation to raise additional fund, 150
Other person may exercise discretion, 281
Permanent trust, 315
Personal, death, insanity, etc., 309
Poor judgment, court interference, 275
Power to apportion, 281
Power to make donations, 153
Power to sell, 111
Property in hands of exemption, inheritance tax, 530
Public school authorities, cy pres, 108
Refusal, effect, 313
Religious community, charity, 166
Removal, 316
Sale by and to, validity, 114
Selection of beneficiary Tilden act, 36
Substitution, 449
Successor, appointment, cy pres, 115
Successors, provision, 320
Tilden act, 37
Unincorporated society as, 21, 248
Unincorporated society, mortmain, 358
University, cy pres, 105
Virginia churches, 22
Void power, confinement to charity, 267
Water commissioners, for library, 215

Tuberculosis Hospital — See Hospital

(References are to pages)

State conducted, gift to, 219
Tuition—See Payment
Fixed without regard to cost, exemption, 479
Free, general intent, cy pres, 94
Poor children, gift to church, 184
Public school, construction, 403
Scholar, damage liability, 547
Scholarship, cy pres, 109
Students, effect, 155
Surplus, application to athletics, etc., taxation, 514
To cover expense, exemption, 483
Tulane, Paul—Gift, 54
Tulane University—
Foundation, 54
Turnerhall—
Institution of learning, exemption, 467
Turnpike Road—See Road
Damage liability, exemption, 536
Twelve Tables—Roman law, 1
Typewriting School—
Exemption, 514
Uncertainty—See Certainty
Beneficiaries, 235
Element of charity, 236
Tilden act, 35
Underpaid—
Clergymen, gift to, 227
Unfortunate—
Relief, library society, 198
Unimproved Land—
Exemption, 502
Unincorporated—
Damage liability, 548
Unincorporated Association—
Gift void, 27
Unincorporated Church—
Educational gift, 184
Mortmain, 358
Unincorporated Society—
Absolute gift to, rules of society, 250
Absolute gift, validity, New York, 249
Annual income limited in Pennsylvania, 56
Appointment, trustee, wish of society, 311
Definition, organization, 252
Devise and bequest, 250
Dissolution, reversion, gift, 100
Early English statute, 245
Expressly authorized, 347
Gift in presenti, validity, 233
Gift void, 221
Gift void, Wisconsin, 40
Incorporation, appointment as trustee, 311
Incorporation, effect, future estate, 231, 254
Incorporation, effect, New York, 248
Named as trustee, 248
New York, 248
Partnership, 254
Quasi corporation, validity, 253
Receipt of legacy, discharge of executor, 250
Salvation Army, 44
Taxation, 525
Tilden act, 36
Trustees, incapacity, 312
Trustee of charity, 21
United States Supreme Court holding, 246
Union—
Between churches, impossibility, cy pres, 96
Temperance, charity, exemption, 192
Unitarian—
Class limited to, 292
Congregational, charity, 169
United States—
As trustee, 339
Debt, gift to, 219
Grant by, charity, 153
Indian and African children, class, 305
"Infamous Union," effect, 148
Legislative cy pres power, 117
Mormon case, cy pres, 101
United States Flag—
Discretion, 260
Perpetuation, 209
United States Service—
Daughters of men dying in, 227
United States Supreme Court—
Development of charity doctrine, 5
Hart case, 21
Universal Journal—
Discretion, validity, 266
Universalist Church—
Gift to, cy pres, 96
University—See College, Education, School, Campus
Charity, 203
Conveyance to hospital, effect, 150
Corporate property, extent, 490
Cy pres, old institution, 107
Damage liability, gopher guns, 541
Exemption, 526
Farm, taxation, 478
Fraternity house on land of taxation, 516
Gift to, 214
Individual trustees, cy pres, 105
Mortmain, 358
Payment by student, 156
Seminary, merger, 509
Test of charitable character, 202
Tuition, effect, 155
Tulane, foundation, 54
Unwise—Gifts, effect, 149

(References are to pages)

Use—
Cemetery, taxation, distinct tract, 518
Dominant factor, taxation, 505
"Used"—
Abandoned building, 505
For charitable purposes, use decisive, 473
Private property, exemption, 506
"Used for Profit"—
Damage liability, 541
"Useful"—Significance, 272
Useful Arts, 205
Usefulness—Cy pres, 105
Uses—
Superstitions, statute of, 14
Utah—
Legal development, 62, 63
Liberal construction, 465
Mormon case, cy pres, 101
Mormon church, gift to bishop, 273
Vacant Lots — See Unimproved Land
Exemption, 503
Vacation—
Use of school in for boarding house, 485
Vague—
Beneficiaries, charity, 236
Valley Forge—
Property, gift for, 218
Value—
Incumbrance, deducted, mortmain, 347
Remainder, life tables, 357
Variety—Motive for charity, 131
Vault—Repair, trust, 371
Vegetable Garden—See Garden
Taxation, 461, 498
Verbal Expressions—
Testator, not admissible, 398
Verbal Instructions—
Discretion, trustees, 262
Verbal Promises—
Creating charities, 153
Vermont—
Amicus curia may enforce trust, 430
Ban v. Smith, 6
Legal development, 62
Liberal construction, 465
Separate bond by officer appointed a trustee, 325
Vested Rights—
Statute of Elizabeth, 19
Vesting—
Charitable gift, perpetuity, 376
Vestrymen—Trustees, 247
Veterans, Civil War—
Beneficiaries, 531
Vicinity—
Of Boston, gift to Masons, class, 289
Views—Discretion, trustees, 262
Village—See City, Municipal Corporation, Town, City, County
Change to school district, charitable gift, 338
Gift to, for school, 213
Poor, class, 290
Virginia—
Abolishment of English charity doctrine, 221
Adoption of English statutes, 58
Church corporation, prescription, 22
Court discretion, 276
Cy pres, 79
Damage liability, hot bottle, 553
Early history, 21
Federal courts, 68
Gift to corporation, 226
Grant to Kentucky, 49
Hart case, 5
Kentucky copy of statute, 50
Liberal construction, 392
Repeal of statute adopting English statute, 21
Statute of 1805, 21
Statute of Elizabeth, 20
U. S. Supreme Court decision, influences, 21, 246
West Virginia followed, 24
Will conveying proceeds of Pennsylvania land, 449
Visions of Piers Plowman—
Followed by statute of Elizabeth, 124
Visitors—Extent of power, 420
Visitorial Power—
Power merely to correct abuser, 418
Supreme court, original jurisdiction, 426
Vivisection—
Charity, 193
Investigation league, exemption, 532
Void—
Gift in excess, mortmain, 347
Voidable—
Gift in excess, mortmain, 348
Mortmain, 348
Vote—As creating charity, 153
Vouchers—
Annual report, power of court, 426
Wages—See Salary
Railroad hospital, profit, damage liability, 554
Teachers, public school, help, 214
Waiver—
Damage liability, reason for theory, 555
Mortmain, 357
Of condition, 441
Theory, damage liability, 551
War—Difficulties, cy pres, 89

(References are to pages)

Washington—
Devise, testators, domiciled in California, 451
Legal development, 62, 63
Water—
Cemetery supply, taxation, 519
Supply of city by college, exemption, 487
Water Bottle—
Damage liability, 548
Water Commissioners—
Trustee for library, 215
Waterworks—
Cisterns, cy pres, 93
Gift to, 213
Of school, exemption, 495
Trees, 217
Wayward Girls—See Home
Maternity home, 187
Weakness—
Of beneficiary church, effect, 149
Wealth—See Poor
As public trust, 120
Charity, 135
Education, immaterial, 199
Wealthy—
Least wealthy class, limited by, 291
Webster, Daniel—
Girard Will case, 6, 149
Welfare—
Social, discretion, validity, 265
"Westerly Part"—
Description, sufficiency of, 242
West Virginia—
Abolishment of English charity doctrine, 221
Charity situation, 20
Cy pres, 79
Development, 5
Devise to foreign corporation, validity, 451
Federal courts, 69
Gift to foreign religious corporations, 448
Legal development, 24
Masonic lodge, taxation, 522
U. S. Supreme Court decision, influence, 246
White Children—See Colored, Negroes, Children
As charitable class, 305
White Race—See Race
Classification by, 293
"Wholly" for poor children—
Public school, cy pres, 94 ,95
Widows—
Classification, 294
Homes, 186
Mosaic law, 2
Of lodge members, 53
Of Masons, 293
Of town, class, 305
Plaintiff to enforce trust, 430
Poor, gift to, 217
Widows of Ministers—Class, 289
Widowhood—
Remainder to charity, 378
Wild Land—Exemption, 502
Will—
Connecticut, cy pres, 80
Effect, when, 45
To charity, 152
William the Conqueror—
Abbot of St. Albans, 15, 341
Window—
Memorial, Louisiana, 307
Wisconsin—
Aberration from English charity doctrine, 246
Abolishment of English charity doctrine, 221
Approval of Missouri definition, 140
Catholic woman's club taxation, 499
Class narrower than charity generally, 290
Copy of trust act from Michigan, 38
Cross currents, 69n
Cy pres, 79
Gift for masses, 179
Led astray by New York, 30
Legal development, 40
Payment by beneficiaries, exemption, 482
Perpetuity, extension, 381
Publishing house, taxation, 489
Respondeat superior, damage liability, 550
Stock corporation, exemption, 515
Trust statute copied by Minnesota, 43
Wisdom—Necessity, 148
Wish—
Vague, to create charity, not sufficient, 398
Wishes—
Discretion, trustees, 262, 263
"Within the State"—
Construction, taxation, 528
Woman Suffrage, 209 — See Suffrage
Classification, 295
Women—See Female
Classification, unmarried, 294
Deserving aid, 227
Poor, gift to, 217
Teachers may be limited to, 206
Women's Christian Temperance Union—
Exemption, 532
Woodhouse—
Of school, exemption, 495
Wood Splitting Outfit — See Carpenter Shop, Workshop
Rescue mission, exemption, 478
Woodyard—
Industrial home, damage liability, 547, 548

(References are to pages)

Words—
Added or omitted in donee's name, 414
Work — See Payment, Tuition, Fees
Beneficiary, damage liability, 547
Working Girls—See Girls
Classification, 295
Garment factory owned by hospital, liability for negligence, 541
Home, 186, 187
Home, exemption, 506
Home, payment, 157
Working Men—
Clubs, library, 207
Workman's Compensation—
Charitable institution, 558
Workshop — See Carpenter Shop, Wood Splitting Outfit
House of refuge, taxation, 478
World's Exposition—
Not a charity, 141
World's Peace Foundation — See Peace, Peace Society
Charity, exemption, 207, 531
World War—Amusements, 210
Worn-Out Preachers—
Support as charity, 169
Worship—House of charity, 163
Worthy—Construction, 272
Worthy Persons—
Discretion, validity, 266
Writing—
Necessity, selection of beneficiary, 281
Reference to, discretion, trustees, 263
Wyoming—Legal development, 61
X-Ray Injuring—
Physician, hospital, damage liability, 557
Yearly Account—
North Carolina, 49
Y. M. C. A.—See Y. W. C. A.
Apportionment, taxation, 510
As charity, 156
Damage liability, 539
Exemption, amusement, 515
Lodges, exemption, 506
Religious society, 516
Y. W. C. A.—See Y. M. C. A.
Acceptance of gift by, 394
As charity, 156
Damage liability, screen door falling, 550
Destroyed building, exemption, 504, 505
Exemption, 515
Zanesville—
Gift to, construction, 338

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